



저작자표시-비영리 2.0 대한민국

이용자는 아래의 조건을 따르는 경우에 한하여 자유롭게

- 이 저작물을 복제, 배포, 전송, 전시, 공연 및 방송할 수 있습니다.
- 이차적 저작물을 작성할 수 있습니다.

다음과 같은 조건을 따라야 합니다:



저작자표시. 귀하는 원저작자를 표시하여야 합니다.



비영리. 귀하는 이 저작물을 영리 목적으로 이용할 수 없습니다.

- 귀하는, 이 저작물의 재이용이나 배포의 경우, 이 저작물에 적용된 이용허락조건을 명확하게 나타내어야 합니다.
- 저작권자로부터 별도의 허가를 받으면 이러한 조건들은 적용되지 않습니다.

저작권법에 따른 이용자의 권리는 위의 내용에 의하여 영향을 받지 않습니다.

이것은 [이용허락규약\(Legal Code\)](#)을 이해하기 쉽게 요약한 것입니다.

[Disclaimer](#)

국제학박사학위논문

**A Legal Analysis of “Standard” in the WTO Agreement
on Technical Barriers to Trade**

WTO 무역기술장벽 협정의 표준에 관한 법적 연구

2014년 8월

서울대학교 국제대학원
국제학과 국제통상전공

김 민 정

**A Legal Analysis of “Standard” in the WTO Agreement
on Technical Barriers to Trade**

WTO 무역기술장벽 협정의 ‘표준’에 관한 법적 연구

by

Minjung Kim

**A thesis submitted in conformity with the requirements
for the degree of Doctor of Philosophy (Ph. D.)
Graduate School of International Studies
Seoul National University**

July 2014

ABSTRACT

Recently, standard is an increasingly important non-tariff barrier in the world trade system. However, the WTO Agreement on Technical Barriers to Trade (TBT), which has been adopted to deal with issues of trade-restrictive standards, is yet to be adequately utilized and effectively applied to discipline such a problem. This thesis observes that one of the major regulatory limitations of the current TBT regime is the Agreement's ambiguity in the concept of 'standards' and its regulatory scope. Therefore, this thesis attempts to clarify the meaning, regulatory scope and legal status of 'standards' in the TBT Agreement. In particular, this thesis finds it fundamentally essential to compare the concept of 'standards' with the concept of 'technical regulations' and to examine the legal element of "mandatory/voluntary compliance", which serves as a determinative legal criterion to distinguish 'standards' from 'technical regulations', with a view to suggest a proper meaning and boundary of 'standards' for the purpose of the Agreement. This thesis basically relies on two sources of evidence that are considered to be most relevant and useful. One is the conceptual development of 'standards' over the past GATT/WTO negotiations and the other is the legal development of the terms 'standards' and "mandatory/voluntary compliance" interpreted and applied in recent TBT disputes.

The result of the analysis on the conceptual development primarily shows that there have been notable changes in the concept of 'standards' adopted by major draft and final TBT codes and agreements in the GATT/WTO history. For instance, the analysis finds that the legal status of 'standards' in the past TBT draft and final codes was actually equivalent to that of 'technical regulations'. However, the equivalent legal status has been significantly revised during the Uruguay Round negotiations and, as a result, in the current TBT Agreement, 'standards' are indirectly and less strictly regulated, when compared to 'technical regulations'. Another finding shows that, in the past, the concept of 'standards' was largely comprised with characteristics of the standards bodies and these characteristics of the bodies were main features that distinguished the concept of 'standards' from the concept of

‘technical regulations’. However, these components have evolved to be almost meaningless in the current TBT regime since the scope of standards bodies have broadened to incorporate virtually all bodies and the scope of the bodies that enact and enforce standards is actually identical with the scope of the bodies that implement ‘technical regulations’. Moreover, the requirement of “mandatory/voluntary compliance” was strictly dependent on some legal criteria in the early draft and final codes, but these legal elements have been gradually removed from the legal texts throughout the negotiations, making the distinction between ‘standards’ and ‘technical regulations’ substantially blurred and obscure in the current TBT Agreement.

These findings altogether imply that there has been increasing ambiguity in the concept of ‘standards’ and its regulatory scope under the TBT Agreement. This is a serious limitation of the TBT regime, since such a vague concept can cause confusion and uncertainty in the implementation and operation of the TBT Agreement. Consequently, it can also make the TBT regime less useful and ineffective. Accordingly, this thesis suggests that such a loophole should be addressed with a more careful interpretation of the terms ‘standards’ and “mandatory/voluntary compliance” and, thus, the second part of the thesis is devoted to examining various approaches to the interpretation of these concepts in order to find out an appropriate context for interpreting the concept.

Therefore, this thesis moves on to examine the recent discussions surrounding the concepts of ‘standards’ and “mandatory/voluntary compliance”. The analysis largely concludes that the term ‘standard’ is usually interpreted in the context of determining a “relevant international standard” as provided in Article 2.4 of the TBT Agreement but the review processes have not been consistent. In addition, it finds that the definition of ‘standard’ is only limitedly considered when the legal characterization of a measure at issue is reviewed. Furthermore, the concept of “mandatory/voluntary compliance” is still left unclear, if not obscured even further, by the interpretations in *US-Tuna II*.

In line with these implications and partial conclusions of the analyses summarized above, the thesis finally revisits the concept of ‘standards’ and attempts to suggest an appropriate way of understanding and applying the concept. This thesis argues that it may be desirable to carry out the legal characterization of a measure in accordance with a suggested two-stage review process, rather than with the one-stage-three-criteria review process introduced, but

not consistently applied, in the actual dispute settlements up to the present. It further argues that the recent approach to interpreting “mandatory/voluntary compliance” concept in *US-Tuna II* cannot be a generally applicable set of criteria for other disputes. In addition, it criticizes that some of the interpretative approaches were overly relied on textualism. Finally, it emphasizes that the concept of “mandatory/voluntary compliance” should be extensively applied so that part of the legally voluntary but virtually mandatory ‘standards’ can be more directly and effectively regulated by the TBT Agreement.

SUMMARY TABLE OF CONTENTS

Chapter 1. Introduction.....	1
1.1 Nature of the Issue.....	1
1.2 Scope of the Study.....	4
1.3 Definitions	6
1.4 Overview of Principal Conclusions.....	7
Chapter 2. Unstandardized Concept of <i>Standard</i>.....	13
2.1 <i>Standards</i> in Various Contexts	13
2.2 Concepts of “Standard” in the WTO Agreements	18
2.3 Chapter Summary and Partial Conclusion.....	34
Chapter 3. ‘Standards’ Treatment in the WTO TBT Agreement.....	36
3.1 Product Standards in the TBT Regime	36
3.2 ‘Standards’ of the WTO TBT Agreement	39
3.3 ‘Standards’ Disciplines of the WTO TBT Agreement	53
3.4 Chapter Summary and Partial Conclusion.....	65
Chapter 4. Conceptual Development of “Standard” in the GATT/WTO system	71
4.1 Chapter Overview.....	71
4.2 “Standard” after the Kennedy Round Negotiations.....	72
4.3 “Standard” during the Tokyo Round Negotiations.....	94
4.4 “Standards” in the <i>Standards Code</i>	148
4.5 “Standards” during the Uruguay Round Negotiations.....	158
4.6 Chapter Summary and Partial Conclusion.....	190
Chapter 5. The Distinction between ‘Standard’ and ‘Technical Regulation’	199
5.1 Chapter Overview.....	199
5.2 Determination of a ‘Standard’	200
5.3 Determination of a ‘Technical Regulation’	206
5.4 Determination of “Mandatory Compliance” in <i>US-Tuna II</i>	214
5.5 Divergent Approaches to Interpret the Concept of “Mandatory Compliance” ..	230
5.6 Chapter Summary and Partial Conclusion.....	237

Chapter 6. Revisiting ‘Standard’ in the TBT Regime	239
6.1 Revisiting the Legal Characterization Review of ‘Standard’	239
6.2 Revisiting the Concept of “Mandatory” Compliance	251
6.3 Revisiting ‘Standard’ in the TBT Regime	262
Chapter 7. Conclusion	264
BIBLIOGRAPHY	268
ABSTRACT IN KOREAN	285
ACKNOWLEDGEMENTS	290

TABLE OF CONTENTS

Chapter 1. Introduction.....	1
1.1 Nature of the Issue.....	1
1.2 Scope of the Study.....	4
1.3 Definitions.....	6
1.4 Overview of Principal Conclusions.....	7
 Chapter 2. Unstandardized Concept of Standard.....	 13
2.1 Standards in Various Contexts	13
2.1.1 General meanings of standard.....	15
2.1.2 Meanings of standard in economics.....	17
2.2 Concepts of “Standard” in the WTO Agreements.....	18
2.2.1 Overview.....	18
2.2.2 Boundaries of the TBT standards	21
2.2.3 Service standards in the GATS	22
2.2.3.1 The GATS scope of service standards	23
2.2.3.2 The GATS disciplines for service standards	25
2.2.4 Government procurement standards in the Agreement on Government Procurement.....	26
2.2.4.1 The GPA scope of government procurement standards.....	27
2.2.4.2 The GPA disciplines for government procurement standards.....	28
2.2.5 Sanitary and phytosanitary standards in the SPS Agreement	28
2.2.5.1 The SPS Agreement scope of sanitary and phytosanitary standards.....	29
2.2.5.2 The SPS Agreement disciplines for SPS standards.....	31
2.3 Chapter Summary and Partial Conclusion.....	34
 Chapter 3. ‘Standards’ Treatment in the WTO TBT Agreement.....	 36
3.1 Product Standards in the TBT Regime.....	36
3.1.1 Standards and Trade.....	36
3.1.2 Standards and the TBT Agreement.....	37
3.2 ‘Standards’ of the WTO TBT Agreement	39
3.2.1 The definition of ‘standard’	39
3.2.2 A legal requirement of “product characteristics”.....	42
3.2.3 An issue of PPM ‘standard’	43

3.2.4 A legal element of “for common and frequent use”	48
3.2.5 A legal element of “approval by a recognized body”	49
3.2.6 A legal element of “voluntary compliance”	52
3.3 ‘Standards’ Disciplines of the WTO TBT Agreement	53
3.2.1 Regulatory structure of the TBT Agreement	53
3.2.2 Common disciplines for ‘standard’ and ‘technical regulation’	57
3.2.3 Different disciplines for ‘standard’ and ‘technical regulation’	59
3.2.3.1 No explicit requirement of “legitimate objectives” for standards	60
3.2.3.2 Requirements of participation in the preparation of international standards	62
3.2.3.3 Requirements of national harmonization and national consensus for standards	63
3.2.3.4 Publication of standards in preparation and notification to ISO/IEC Information Center	63
3.2.3.5 Positive approach for technical regulations vs. negative approach for standards	64
3.4 Chapter Summary and Partial Conclusion	65
Chapter 4. Conceptual Development of “Standard” in the GATT/WTO system	71
4.1 Chapter Overview	71
4.2 “Standard” after the Kennedy Round Negotiations	72
4.2.1 Rising issues of nontariff barriers after the Kennedy Round negotiations	72
4.2.2 Efforts to identify the problems of standards	74
4.2.2.1 Identifying the problems of nontariff barriers	74
4.2.2.2 Building an inventory of standards problems	76
4.2.2.3 An issue of distinguishing voluntary standards from compulsory regulations	78
4.2.2.4 An issue of balancing the resulting imbalance of implementation burden	81
4.2.3 The 1973 draft Standards Code	82
4.2.3.1 Regulatory structure of the 1973 Draft Standards Code	82
4.2.3.2 Distinction between mandatory standards and voluntary standards	86
4.2.3.3 Disciplines for mandatory standards and voluntary standards	91
4.3 “Standard” during the Tokyo Round Negotiations	94
4.3.1 The TBT subgroup of the Trade Negotiation Committee	94
4.3.2 Overview of major issues negotiated during the Tokyo Round	96
4.3.3 Coverage of the draft Standards Codes	99
4.3.3.1 Applicability of the Code to agricultural products and SPS measures	99
4.3.3.2 Applicability of the Code to health and sanitary regulations	102

4.3.3.3	Applicability of the Code to labelling	103
4.3.3.4	Applicability of the Code to packaging.....	105
4.3.3.5	Applicability of the Code to marks of origin	107
4.3.4	Concepts and definitions of “standards” in the early negotiations	108
4.3.4.1	Concepts of “standard” in the early negotiations	108
4.3.4.2	Terminologies and definitions in the draft Standards Codes and the ECE/ISO definitions.....	110
4.3.4.3	Draft Standards Codes’ harmonization with the ECE/ISO definitions	116
4.3.4.4	Definitions in the 1973 Draft Standard Code and the ISO/ECE definitions	121
4.3.5	Conceptual and rule developments in major draft Standards Codes.....	132
4.3.5.1	Overview of the major draft Standards Codes	132
4.3.5.2	Development of standards definitions in major draft Standards Codes ...	133
4.3.5.3	Development of disciplines in major draft Standards Codes	141
4.3.5.4	Development of regulatory scopes and disciplines: An analysis of the 1978 Draft Standards Code	143
4.4	“Standards” in the Standards Code.....	148
4.4.1	Terminology and definitions.....	148
4.4.2	Regulatory structure of the Standards Code	150
4.4.3	Disciplines for “standards” and “technical regulations”	152
4.4.3.1	Common disciplines for technical regulations and standards by central government bodies	152
4.4.3.2	Different disciplines for technical regulations and standards by central government bodies	154
4.4.3.3	Obligations for standard-related activities by local government bodies: GATT Standards Code Article 3	154
4.4.3.4	Obligations for standard-related activities by non-government bodies: GATT Standards Code Article 4	156
4.5	“Standards” during the Uruguay Round Negotiations	158
4.5.1	Overview of the Uruguay Round negotiations on “standards”	158
4.5.2	Major issues related to both “technical regulations” and “standards”	163
4.5.2.1	An issue of Article 2.1 “unnecessary obstacles to international trade”	163
4.5.2.2	An issue of enhancing the compliance of local government bodies	166
4.5.2.3	An issue of covering process and production methods	168
4.5.2.4	An issue of considering a labelling as a technical regulation.....	171
4.5.2.5	Discussion on information of voluntary draft standards and voluntary standards being made mandatory by legislation.....	174
4.5.3	Issues of inserting a Code of Good Practice for “standards” disciplines.....	176

4.5.3.1 An initial proposal by the EC for the Code of Good Practice for Non-Governmental Standardizing Bodies.....	177
4.5.3.2 A revised proposal for the Code of Good Practice for Standards	183
4.5.3.3 The final version of the Code of Good Practice for the Preparation, Adoption and Application of Standards	189
4.6 Chapter Summary and Partial Conclusion.....	190
Chapter 5. The Distinction between ‘Standard’ and ‘Technical Regulation’	199
5.1 Chapter Overview	199
5.2 Determination of a ‘Standard’	200
5.2.1 A context in which a ‘standard’ is determined in disputes	200
5.2.2 The determination of a ‘standard’ in EC-Sardines.....	201
5.2.3 The determination of a ‘standard’ in US-Tuna II	202
5.2.4 A comparison of the two approaches for determining the concept ‘standard’ in disputes	205
5.3 Determination of a ‘Technical Regulation’	206
5.3.1 The three criteria driven from the definition of ‘technical regulation’	206
5.3.2 The criterion “identifiable product or group of products”	207
5.3.3 The criterion “lays down product characteristics”	209
5.3.4 The criterion “mandatory compliance”	212
5.4 Determination of “Mandatory Compliance” in US-Tuna II	214
5.4.1 Arguments of the disputants	215
5.4.1.1 Mexico’s interpretation of “mandatory” compliance	215
5.4.1.2 US’ interpretation of “mandatory” compliance.....	217
5.4.2 The Panel’s decision	218
5.4.3 A dissenting opinion of the Panel	223
5.4.4 The Appellate Body’s decision	226
5.4.5 Summary of approaches to apply the element of “mandatory” compliance	228
5.5 Divergent Approaches to Interpret the Concept of “Mandatory Compliance”	230
5.5.1 An approach based on “market sales condition” criterion	231
5.5.2 An approach based on “de jure” and “de facto” criteria	234
5.5.3 An approach based on “exclusivity” criterion	236
5.6 Chapter Summary and Partial Conclusion.....	237
Chapter 6. Revisiting ‘Standard’ in the TBT Regime	239
6.1 Revisiting the Legal Characterization Review of ‘Standard’	239
6.1.1 Implications from the conceptual development of ‘standard’	241
6.1.1.1 Implications from the analysis of “standard” in the 1973 Draft Standards	

Code	241
6.1.1.2 Implications from the analysis of “standard” in the Standards Code	242
6.1.2 Legal evidence from the analysis of ‘standard’ in the WTO TBT Agreement	245
6.1.3 A suggestion on a two-stage review process for the legal characterization of a ‘standard’	247
6.2 Revisiting the Concept of “Mandatory” Compliance	251
6.2.1 General applicability of the four criteria for the concept of “mandatory/voluntary” compliance	252
6.2.1.1 A criterion to be based on “enactment by law”	254
6.2.1.2 A criterion to “prescribe, prohibit, or regulate certain product characteristics”	256
6.2.1.3 A criterion of “only and exclusive means”	258
6.2.1.4 A criterion to consider “nature of the matter addressed” and a suggestion to consider specificity of the matter	260
6.2.2 Reconsidering the concept of “mandatory” based on the market-entry condition criterion	261
6.3 Revisiting ‘Standard’ in the TBT Regime	262
Chapter 7. Conclusion	264
BIBLIOGRAPHY	268
ABSTRACT IN KOREAN	285
ACKNOWLEDGEMENTS	290

LIST OF ABBREVIATIONS

AB	Appellate Body
AIDCP	Agreement on International Dolphin Conservation Program
CPs	Contracting Parties
DPCIA	Dolphin Protection Consumer Information Act of 1990
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EC	European Community/ European Communities
ECE	Economic Commission for Europe
EU	European Union
GATS	General Agreement on Trade in Services
GATT 1947	General Agreement on Tariffs and Trade 1947
GATT 1994	General Agreement on Tariffs and Trade 1994
GPA	Agreement on Government Procurement
IEC	International Electrotechnical Commission
ISO	International Organization for Standardization
MFN	Most-Favored Nation treatment
NGO	Non-governmental organization
SPS	Sanitary and Phytosanitary
SPS Agreement	Agreement on Sanitary and Phytosanitary Measures
STD	Standard
TBT	Technical Barriers to Trade
TBT Agreement	Agreement on Technical Barriers to Trade
TNC	Trade Negotiation Committee
TR	Technical Regulation

TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UN	United Nations
UR	Uruguay Round
US	United States
WTO	World Trade Organization

LIST OF WTO DISPUTES CITED

Short Title	Full Case Title and Citation
EC-Asbestos	Appellate Body Report, <i>European Communities-Measures Affecting Asbestos and Asbestos-Containing Products</i> , WT/DS135/AB/R, adopted 5 April 2001
EC-Biotech Products	Panel Report, <i>European Communities-Measures Affecting the Approval and Marketing of Biotech Products</i> , WT/DS291/R, WT/DS292/R, WT/DS293/R, Add.1 to Add.9 and Corr.1, adopted 21 November 2006
EC-Hormones (US)	Appellate Body Report, <i>EC Measures Concerning Meat and Meat Products (Hormones)</i> , WTO/DS26/AB/R, adopted 13 February 1998
EC-Sardines	Appellate Body Report, <i>European Communities-Trade Description of Sardines</i> , WT/DS231/AB/R, adopted 23 October 2002
EC-Sardines	Panel Report, <i>European Communities-Trade Description of Sardines</i> , WT/DS231/R and Corr.1, adopted 23 October 2002, as modified by Appellate Body Report WT/DS231/AB/R
EC-Trademarks and Geographical Indications (Australia)	Panel Report, <i>European Communities-Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs, Compliant by Australia</i> , WT/DS290/R, adopted 20 April 2005
Canada-Autos	Appellate Body Report, <i>Canada-Certain Measures Affecting the Automotive Industry</i> , WT/DS139/AB/R, adopted 19 June 2000
US-Clove Cigarettes	Appellate Body Report, <i>United States-Measures Affecting the Production and Sale of Clove Cigarettes</i> , WT/DS406/AB/R, adopted 24 April 2012
US-Clove Cigarettes	Panel Report, <i>United States-Measures Affecting the Production and Sale of Clove Cigarettes</i> , WT/DS406/R, adopted 24 April 2012, as modified by Appellate Body Report WT/DS406/AB/R
US-COOL(Mexico)	Appellate Body Report, <i>United States-Certain Country of Origin Labelling (COOL) Requirements</i> , WT/DS386/AB/R, adopted 23 July 2012
US-COOL(Canada)	Appellate Body Report, <i>United States-Certain Country of</i>

	<i>Origin Labelling (COOL) Requirements</i> , WT/DS384/AB/R, adopted 23 July 2012
US-COOL(Mexico)	Panel Report, <i>United States-Certain Country of Origin Labelling (COOL) Requirements</i> , WT/DS386/R, adopted 23 July 2012, as modified by Appellate Body Report WT/DS386/AB/R
US-COOL(Canada)	Panel Report, <i>United States-Certain Country of Origin Labelling (COOL) Requirements</i> , WT/DS384/R, adopted 23 July 2012, as modified by Appellate Body Report WT/DS384/AB/R
US-Seal(Norway)	Appellate Body Report, <i>European Communities-Measures Prohibiting the Importation and Marketing of Seal Products</i> , WT/DS401/AB/R
US-Seal (Canada)	Appellate Body Report, <i>European Communities-Measures Prohibiting the Importation and Marketing of Seal Products</i> , WT/DS400/AB/R
US-Seal(Norway)	Panel Report, <i>European Communities-Measures Prohibiting the Importation and Marketing of Seal Products</i> , WT/DS401/R, adopted
US-Seal(Canada)	Panel Report, <i>European Communities-Measures Prohibiting the Importation and Marketing of Seal Products</i> , WT/DS400/R, adopted
US-Tuna II	Appellate Body Report, <i>United States-Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products</i> , WT/DS381/AB/R, adopted 16 May 2012
US-Tuna II	Panel Report, <i>United States-Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products</i> , WT/DS381/ R, adopted 16 May 2012 , as modified by Appellate Body Report WT/DS381/AB/R

LIST OF FIGURES

Figure 1	An analytic framework applied in this thesis	5
Figure 2	A summary of the issues regarding the scope of PPM standards.....	46
Figure 3	Regulatory scope of the WTO TBT Agreement.....	53
Figure 4	Different degrees of obligation in the WTO TBT Agreement	55
Figure 5	Regulatory scope of the 1973 Draft Standards Code	85
Figure 6	Major TBT issues negotiated during the Tokyo Round	97
Figure 7	Comparison of the early GATT model and the ECE/ISO model.....	122
Figure 8	Structure of the subject matters in the early draft Standards Codes.....	133
Figure 9	Regulatory scope of the October 1978 Draft Standards Code.....	147
Figure 10	Regulatory scope of the Tokyo Round Standards Code.....	151
Figure 11	Major TBT issues negotiated during the Uruguay Round.....	162
Figure 12	Initial proposal for Code of Good Practice replacing Article 4.....	178
Figure 13	Revised proposals for Code replacing the ‘standards’ disciplines	186
Figure 14	Structure of the subject matters in the WTO TBT Agreements	244
Figure 15	Currently applied one-stage process for legal characterization.....	248
Figure 16	A suggested two-stage model for legal characterization procedure	250

LIST OF TABLES

Table 1.	Legal Elements of Technical Regulations and Standards	42
Table 2.	Common disciplines for technical regulations and standards in the WTO TBT Agreement.....	58
Table 3.	Different disciplines for technical regulations and standards in the WTO TBT Agreement.....	67
Table 4.	Terminologies and Definitions of the 1973 Draft Standards Code.....	88
Table 5.	Common disciplines for mandatory standards and voluntary standards in the 1973 Draft Standards Code	92
Table 6.	Comparison of the term “standard” in the draft Standards Codes and in the ECE definitions	111
Table 7.	Comparison between the term “quality assurance system” in the draft Standards Codes and the term “certification system” in the ECE definitions	112
Table 8.	“Standard”-related terms in the draft Standards Codes and their corresponding terms and definitions in the ECE definitions	113
Table 9.	“Quality assurance system”-related terms in the draft Standards Codes and their corresponding terms and definitions in the ECE definitions	115
Table 10.	Draft Standards Codes’ major terms and definitions considered for harmonization with the ECE/ISO definitions.....	125
Table 11.	Draft Standards Codes’ major terms and definitions negotiated during the Tokyo Round.....	135
Table 12.	Terminologies and Definitions of the Tokyo Round Standards Code	149
Table 13.	Common and different disciplines for central, local and non-government bodies in the Tokyo Round Standards Code	157
Table 14.	A summary of major issues negotiated during the Uruguay Round	160

Table 15.	List of Uruguay Round negotiation documents for Code of Good Practice	176
Table 16.	Comparison of different versions of Code of Good Practice	193
Table 17.	Summary of the disputants' claims and the Panel/Appellate Body's rulings	229
Table 18.	Analytical criteria and a summary of their limitation to be generally applied to determine mandatoriness and voluntariness.....	253

LIST OF BOXES

Box 1	Prior to Tokyo Round - Classification of nontariff barriers	76
Box 2	Prior to Tokyo Round - Identifying standards-related measures.....	77
Box 3	Prior to Tokyo Round - Provisions for “standards” in the 1973 Draft Standards Code.....	84
Box 4	Tokyo Round - Subcommittees of the Trade Negotiation Committee	94
Box 5	Tokyo Round - Subgroups of nontariff measures group	95
Box 6	Tokyo Round - Provisions for “standards” in the October 1978 Draft Standards Code.....	144
Box 7	Tokyo Round - Provisions for “standards” in the Standards Code	148
Box 8	Uruguay Round - Canada’s amendment proposal for Article 2.1	164
Box 9	Uruguay Round - Amendment proposals for Article 2.1 and 2.2.....	165
Box 10	Uruguay Round - EEC’s amendment proposal for Article 3.....	167
Box 11	Uruguay Round - An alternative amendment proposal for Article 3	167
Box 12	Uruguay Round - US amendment proposals to explicitly include PPMs..	169
Box 13	Uruguay Round - New Zealand’s proposals to incorporate PPMs.....	170
Box 14	Uruguay Round - The Committee decision on the scope of labelling.....	173
Box 15	Uruguay Round - EC’s initially proposal to replace Article 4 by a code..	182
Box 16	Uruguay Round - EC’s revised proposal for amending Article 4 and the relevant parts in the February 1990 Draft.....	185
Box 17	Uruguay Round - EC’s revised proposal for amending Article 4 and the relevant parts in the July 1990 Draft	187

Chapter 1. Introduction

1.1 Nature of the Issue

Product standards are developed for various purposes, and widely used in numerous contexts. In general, they have been crucial for modern industrial development, encouraging technological spillovers and enabling product compatibilities. In the meantime, the governments have actively utilized the beneficial function of standards when they implement public policies for protecting the consumers and the environment. Through standardization activities, for example, they have set minimum product qualities, maximum levels of health risks and desirable thresholds for the environment.

The demand for standards is continuously rising as the modern society becomes more aware of market failures such as consumption risks or information asymmetry, and as the global competition in terms of technology and production efficiency intensifies among producers all over the world. As a result, standards are increasing in number and in variety, posing serious problems in international trade environment.

The trade effect of domestic standards is not straightforward. However, the trading partners' dissimilar domestic standards often create trade barriers, and some domestic standards are actually introduced for protectionist intents. These trade-restrictive aspects of standards had been well noted by the early negotiators of the GATT/WTO system and, consequently, the plurilateral GATT Standards Code was adopted after the Tokyo Round to address trade-related standards issues, and this Code was eventually replaced by the WTO Agreement on Technical Barriers to Trade (TBT Agreement) after the Uruguay Round.

The WTO TBT Agreement, therefore, establishes the currently effective multilateral system for preventing trade-restrictive standards and regulating other standards issues. The Agreement defines technical barriers in terms of three sources: 'technical regulations',

‘standards’ and ‘conformity assessment procedures’. These three categories are separately defined in the legal provisions. However, the distinction between ‘standards’ and ‘technical regulations’ in particular is not sufficiently clear for practical uses because the concept of “mandatory/voluntary compliance”, a critical legal element for the division, is found to be ambiguous and confusing in actual interpretation. In fact, the logics and approaches suggested during the interpretation of the terms ‘technical regulations’ and ‘standards’ in *US-Tuna II* have evidently showed that the WTO members, panels and the Appellate Body were all having diverging views and perspectives as regards to the concepts of these terms.

In addition, it is noted that the treatment of ‘standards’ and the treatment of ‘technical regulations’ in the Agreement are fundamentally different. The legal consequence of being ‘standards’ results in relatively indirect application of more general disciplines, when compared with the legal consequence of being ‘technical regulations’. This is because the Agreement’s obligations for ‘standards’ are provided in Annex 4, which is only conditionally applied upon prior acceptance by the standards bodies. Thus, despite the rising importance of standards as non-tariff trade barriers, standards issues are not adequately captured by the current regulatory scope of the Agreement and not yet to be effectively addressed by the disciplines.

Based on this background, the thesis addresses the inherent vagueness in the concept of ‘standards’ in the WTO TBT Agreement and ultimately attempts to clarify the meaning, scope and legal status of them for the purpose of the Agreement. This thesis considers that there are three major distinctive features in the nature of the problem it intends to deal with.

First, the concept of ‘standards’ cannot be examined independently and separately from the concept of ‘technical regulations’ since they share the common dividing line between themselves. In other words, the “mandatory/voluntary compliance” concept is one of the major legal components for both ‘technical regulations’ and ‘standards’, and the interpretation and application of the concept simultaneously affects the meanings and regulatory scopes of the both concepts. Therefore, it is inevitable, in this study, to discuss the concept of ‘technical regulations’ and the interpretation of “mandatory/voluntary compliance” in the context of ‘technical regulations’ along with the delineation of the concept ‘standards’.

Second, this thesis observes that the conceptual evolution of ‘standards’ within the developmental history of the GATT/WTO TBT Agreements over the past decades provides

one of the most relevant reference and a valuable perspective in understanding the concept of ‘standards’ used in the current TBT Agreement. The reasons are twofold. On the one hand, the current concept of ‘standards’ established by the WTO TBT Agreement is fundamentally a result of the past negotiations and, therefore, should be understood in line with the previous concepts introduced in the early draft and final legal texts. This does not necessarily mean that the current state of the concept or the past state of the concept is one of the most desirable or the most improved. On the other hand, a preliminary conclusion of the conceptual developments supports that major changes in the concept of ‘standards’ over the developmental process have been consistent and that there are probably certain evolutionary directions for such changes. This thesis reasons that such evolutionary directions, regardless of their desirability, may provide some relevant and useful contexts for interpreting the legal concept of ‘standards’.

Third, this thesis considers that not only final rulings of the panels and the Appellate body in disputes but all of the arguments and interpretative approaches taken by the disputants and participants to the disputes also provide valuable foundations and references for the interpretation. This is because the legal development in the concepts of ‘standards’ and “mandatory/voluntary compliance” is still at a very early stage and solid jurisprudence for them has not established yet. Therefore, it may be more appropriate for an academic study like this thesis to take into account all relevant ideas and approaches discussed so far and to carefully use them as a basis of finding a desirable perspective for the concepts.

In pursuit of the above-mentioned objectives, Chapter II of this thesis begins with the discussions over various meanings of ‘standards’ found in different contexts and different WTO agreements. Then, Chapter III proceeds to explore the meaning, regulatory scope and legal status of ‘standards’ in the WTO TBT Agreement. Chapter IV thoroughly studies the conceptual development of ‘standards’ traced back in the negotiation process, from the prior period to the Tokyo Round to the Tokyo Round negotiations to the Uruguay Round negotiations. Chapter V carries out rigorous legal analyses on the interpretative approaches to the concept of ‘standards’ shown in disputes and compares them with the corresponding approaches to the interpretations of the concept ‘technical regulations’. Based on the implications from the major analyses on the conceptual developments and legal interpretations, Chapter VI revisits the concepts of ‘standards’ and “mandatory/voluntary

compliance” and suggest new perspectives from which the concept of ‘standard’ should be considered.

1.2 Scope of the Study

The scope of the study in this thesis covers only the legal concepts of ‘standards’, ‘technical regulations’ and other relevant terms such as “mandatory/voluntary compliance” and does not encompass the concept of “conformity assessment procedures” and other procedural standards. In addition, although it examines and compares the common and different disciplines for ‘technical regulations’ and ‘standards’, the comparative analysis is strictly limited to their common and different terminologies, expressions, and languages provided in provisions, and is not extended to more rigorous legal analysis for their interpretations and applications.

In addition, the analysis of the conceptual development of the concept ‘standards’ is largely based on its legal definitions, regulatory scopes, and legal status apparently found in major drafts and final codes, which are carefully selected based upon their significance in conceptual changes and rule developments. The analysis does not attempt to figure out unrevealed intentions by the early negotiators or unexpressed reasons for the revisions unless the relevant official documents provide clear backgrounds and overt reasons regarding certain arguments and revisions.

Furthermore, the following analytic tool is used to examine and compare changes in the concept of ‘standards’ in different draft and final legal texts. The TBT Agreement divides the entire scope of product standards into mandatory ‘technical regulations’ and voluntary ‘standards’ and each category is subject to different rules and disciplines. Article 2 and 3 of the TBT Agreement are applied to ‘technical regulations’ and Article 4 and the Code to standards are applied to ‘standard’. These separate rules and procedures are generally identical to each other. The common principles for both ‘technical regulations’ and ‘standards’ include non-discriminatory treatment between domestic and import products as well as among imported products, prohibition of unnecessary barriers to trade, requirement to

use international standards as a basis, encouragement to participate in international standardizations, and requirement of certain transparency procedures when the members are preparing, adopting, and applying the three categories of technical barriers.

The rules and procedures for ‘technical regulations’ or ‘standards’ are also divided into three levels of standards bodies, which are central government bodies, local government bodies and non-government bodies. This categorization is inherently related to the implementation obligations. The Agreement applies its obligations directly to central government bodies but indirectly imposes disciplines on local and non-government bodies. Also, the Agreement contains the expression “shall ensure” and applies the highest degree of implementation obligations to central government bodies; however, it contains the so-called “best efforts” approach and only demands a relatively lower degree of compliance obligation from local and non-government bodies. In this way, the Agreement further differentiates its treatment to central government standardizing bodies from its treatment to local and non-government standardization bodies’.

Figure 1. An analytic framework applied in this thesis

	Technical regulations	Standards	Conformity Assessment Procedures
Central government bodies	Article 2		Article 5 and 6
Local government bodies	Article 3	Article 4 and the Annex 4 Code of Good Practice	Article 7
Non-government bodies			Article 8

Accordingly, the overall regulatory framework of the TBT Agreement is constructed not only based on different categories of technical barriers, namely, technical regulations, standards, and conformity assessment procedures, but also based on the different levels of standardizing bodies, that is, central government bodies, local government bodies, and non-government bodies. This regulatory framework of the TBT Agreement can be presented in a three-by-three matrix box as drawn in <Figure 1>.

< Figure 1> shows that the regulatory framework of the TBT Agreement is based on the three types of technical barriers - ‘technical regulation’, ‘standard’, and ‘conformity assessment procedure’ - as horizontally represented in each column *and* three different levels of standards bodies - central government bodies, local government bodies, and non-government bodies- as vertically represented in each row. The bold lines represent the actual regulatory scope and dotted lines represent conceptually the most expansive regulatory scope of the TBT Agreement.

The three-by-three matrix drawn in <Figure 1> represents an entire picture of the Agreement’s regulatory structure. However, this thesis addresses legal and regulatory issues of the concept of ‘standards’ and its distinction from the concept of ‘technical regulation’. Therefore, the three-by-three matrix table will be modified to a two-by-three matrix form by excluding the last column in the right side, which represents the regulatory scope of ‘conformity assessment procedures’. The modified two-by-three matrix tool will be applied throughout the analyses in the thesis.

1.3 Definitions

The thesis introduces and addresses various meanings of the term standards and diverse contexts in which they are used. The term sometimes indicates a set of standards used in everyday life and in general contexts. The term may also stand for a specific legal terminology used in certain legal documents. In other contexts, the term probably refers to one of the subject matters provided by the WTO TBT Agreement.

Due to the complexity and multiplicity of the meanings of the term standard, this thesis finds it necessary and useful to distinguish all these three types of standards represented in different contexts, and to identify each of them with a different form of writing. Accordingly, this thesis writes standard in the three respective forms as shown in the following: *standards*, “standards” and ‘standards’.

In order to minimize confusions on the part of the readers, each of them is illustrated. First, the expression *standards* refers to standards used in general and broad meanings. The expression “standards” indicates concepts and subject matters provided in any legal or official texts such as the draft proposals and final versions of the GATT/WTO TBT Agreements or the definitions provided by the ISO/ECE Guides. Finally, the term ‘standards’ is consistently used to represent the category of standards which is defined as one of the three main sources of the technical barriers to trade by the current TBT Agreement and which is the fundamental object of this thesis. In other words, this thesis studies the concept of ‘standards’ in comparison with *standards* or “standards”, and its ultimate goal is to clarify the concept of ‘standards’.

In addition, the expression “mandatory/voluntary compliance” represents both the binding character of compliance for ‘technical regulations’ and the non-binding character of compliance for ‘standards’. The expression is generally used to indicate any type of the compliance for the sake of simplicity. Therefore, the readers should understand that the phrase “mandatory/voluntary compliance” just refers to the legal element or component itself, not to any of the compliance types. When a specific indication is needed, such expressions as “mandatoriness” or “voluntariness” of the compliance will be used.

1.4 Overview of Principal Conclusions

In general, *standards* cover a variety of fields, functions and forms. The term *standard*, therefore, can be hardly defined in specific terms. Since the word *standard* itself implies multiple contexts and situations, its concept can hardly be clearly delineated, which causes a fundamental problem for understanding and applying the term ‘standard’ for the purpose of

operating the WTO TBT Agreement.

Thus, Chapter 2 examines *unstandardized* meanings of *standard* in general contexts. It emphasizes diversity of its meanings by showing examples of different definitions and concepts represented in dictionaries, in economics, and in language of major international, regional and national standards bodies. In addition, this Chapter particularly sheds lights on apparently inconsistent and incoherent use of the term *standard* across different Agreements under the auspice of the WTO regime.

In the GATT/WTO regime, the word *standard* is mainly used to refer to voluntary ‘standards’, one source of technical barriers under the auspice of the TBT Agreement. However, other Agreements also use the term *standard*, but without clearly indicating whether it has the same meaning as the term ‘standards’ used in the TBT Agreement or not. The analysis of this Chapter finds that all the terms “standards” have different meanings and scopes from an Agreement to another, and the explicitly defined meaning of ‘standards’ in the TBT Agreement is not consistently or coherently used in other WTO Agreements. For example, when the word “standards” is used in the GATS and GPA, it generally encompasses very broad meanings and scopes. It probably includes both substantive and procedural standards. Also, the “standards” may refer to products standards or service standards or both depending on the context the term is used.

In addition, it is clear from the analysis of this chapter that none of the contexts in other WTO Agreements, the concept of “standards” is identified as ‘standards’ on the basis of voluntary compliance. Therefore, it seems to be very typical to the case of the TBT Agreement that the term ‘standards’ is defined in terms of voluntary compliance.

The fundamental purpose of the TBT Agreement is to reduce and prevent technical barriers to trade. In other words, the Agreement establishes a regime which prevents and deals with trade-restrictive effect of standards rather than directly controlling standards and standardization activities. Chapter 3, therefore, is devoted to reviewing the current TBT regime that defines ‘standard’ as one of its subject matters and regulates it through disciplines set out in provisions of Article 3 and the Code of Good Practice in Annex 4. In particular, it examines major legal elements that comprise the concept of ‘standards’ for the purpose of the TBT Agreement and adopts a comparative analysis with a view to highlight both common and different features in the Agreement’s treatments toward ‘standards’ and ‘technical

regulations’.

The major findings of the analysis on the meaning of ‘standards’ in the current TBT Agreement include that products must be identifiable in documents of ‘standards’, that it is not still clear as to whether the scope of ‘standards’ covers non-product related PPMs or not, but voluntary labelling, for example, may cover both product-related and non-product related PPMs, and that approval by a recognized ‘standards’ bodies can be perceived from broad perspectives. The concept of ‘standards’ shares many commonalities with the concept of ‘technical regulations’ except for its legal element of “voluntary” compliance.

The comparison of the disciplines concludes that the Agreement’s obligations for ‘standards’ and ‘technical regulations’ are largely identical. Nevertheless, in addition to transparency procedures, there are a few critical differences in disciplines for ‘standard’ such as the Agreement’s no explicit requirement for “legitimate objectives”, expressive requirement for national harmonization and pursuit of national consensus, and requirement for Member’s implementation effort based on a negative approach. Above all, the disciplines for ‘standards’ provided in Annex 4 Code are applied, in principle, only conditionally upon the acceptance by standards bodies.

The GATT/WTO system has long attempted to establish an effective regime to reduce and prevent technical barriers and, after a series of negotiations and revisions, it finally adopted the definitions, regulatory structures and disciplines currently provided in the TBT Agreement. Multilateral negotiations to regulate trade-restrictive standards began right after the Kennedy Round as the negotiators felt a need to discipline non-tariff barriers. The negotiation for standards was generally successful and proceeded with little difficulties compared to other non-tariff barrier issues during the Tokyo Round negotiation.

Nevertheless, there have been substantial changes with respect to definitions, regulatory structures, and disciplines from the initial design to the GATT TBT Agreement and to the WTO TBT Agreement, and the concept of “standards” has experienced several revisions. In consequence, the concept of “standards” defined and regulated by the WTO TBT Agreement now is a result of the long process of previous negotiations and revisions and, therefore, it should be understood and interpreted in line with this developmental context.

Therefore, Chapter 4 concentrates on the conceptual development of ‘standard’ during the past negotiation history of the GATT/WTO system. It first reviews the very early

discussions over the concept and the coverage of ‘standard’ during the drafting period of the Standards Code right after the Kennedy Round. Then, it moves on to examine the rigorous conceptualization process during the Tokyo Round, including discussion over applicability of the Agreement to various subject matters like SPS measures, health and sanitary regulations, labeling, packaging and marks of origin. It traces how the overall coverage of “standard”(the entire subject matter) was finally determined, and how the concept of ‘standard’ (one of the subject matters) was developed and harmonized with the ISO/ECE normative definitions. Then, the chapter analyzes the concept of ‘standard’ – its definition, regulatory scope and disciplines in major draft Standards Codes. Finally, it reviewed the negotiation for inserting the Code of Good Practice annexed to the TBT Agreement during the Uruguay Round.

The analysis of this chapter primarily shows that the concept of “standards” went through substantial changes over the past several decades of negotiation and revision. In particular, the concept of “standard” has long developed in line with the concept of “technical regulations” and the former’s relation with the latter experienced significant alterations until the WTO TBT Agreement was adopted.

One of the major findings of this chapter’s analysis shows that the requirement of voluntary compliance which strictly depended on legal criteria, such as existence of legal basis and evidence of legal enactment and legal enforcement in the past drafts, has evolved to be defined in more general terms and, thus, became ambiguous in its legal criteria. In addition, the concept of ‘standards’ which could be largely confirmed by its non-governmental standards body in previous drafts has now been changed in such a way that it can be adopted or applied by both governmental and non-governmental standards bodies and, thus, the factor of standards body has no longer a critical implication for its concept. Moreover, the analysis finds that the treatment of ‘standards’ was almost equivalent to that of ‘technical regulations’ in the earlier drafts and the final version of the GATT Standards Code; but revisions during the Uruguay Round have led to a result in which the current TBT Agreement establishes relatively indirect and less strict disciplines for ‘standards’.

The ambiguous distinction between ‘standards’ and ‘technical regulations’, in itself, creates a serious loophole in the operation of the TBT Agreement. Unlike the GATT Standards Code which treated “standards” almost equivalently as “technical regulations” except for a

few transparency obligations, the current TBT regime's treatment of 'standards' is apparently more different from its treatment of 'technical regulations'. This legal consequence makes the loophole even more serious. These findings altogether imply that the multilateral trading system's treatment of 'standards' has become more general and less direct, which potentially causes increasing uncertainty in the interpretation of the definition.

In fact, the vague concept of "voluntary/mandatory" compliance was one of the most critical legal issues in recent *US-Tuna II* dispute. Views and arguments were sharply divided regarding its interpretation. Therefore, Chapter 5 analyzes the current interpretation and application of the definitions of 'standard' and 'technical regulation'.

First, it finds that the definition of 'standard' is quite limitedly applied in disputes to date, being interpreted only in the context of "a relevant international standard" as provided in Article 2.4 of the TBT Agreement. There has been no dispute in which 'standard' was interpreted solely for the sake of determining a 'standard' itself. Also, interpretations of "international standard" were found to be inconsistent in disputes. Sometimes, 'standard' was reviewed as a legal element of "international standard" based on the definition of the TBT Agreement but, in other times, the phrase "international standard" was examined exclusively based on the definition in the ISO/ECE Guide.

The second part of the chapter examines the legal interpretations and the consequent determination of a 'technical regulation', which is basically composed of reviews on three legal elements, "identifiable product or group of products", "lays down product characteristics" and "mandatory compliance". In particular, the concept of "mandatory compliance" as interpreted in this context is very important since the criterion also affects the concept and regulatory scope of 'standard'. The concept has rarely been a core legal issue in disputes. However, the disputants in a recent case had substantially different views from each other surrounding the meaning of "mandatory/voluntary compliance" and even the adjudicating bodies like panels and the AB submitted significantly diverging opinions. The analysis shows that the AB considered the "exclusivity" criterion most important for determining the "mandatory/voluntary compliance" concept. The chapter additionally analyzes the major approaches found in disputes, i.e. "market sales condition" approach, "de jure/de facto" approach and "exclusivity" approach, and finds that the adjudicating bodies have overly relied on a strict textualist approach in interpreting the concept "mandatory compliance".

Finally, Chapter 6 revisits the concept of ‘standards’ based on implications driven from the examinations and analyses in the previous chapters. Major findings of the chapter include that the legal characterization of ‘standard’ and ‘technical regulation’ should be based on a two-stage review process and that recently adopted criteria in US-Tuna II dispute fall short of providing generally applicable criteria for reviewing and interpreting the term ‘standards’. In addition, the chapter suggests introducing a concept like “specificity” as a criterion for considering the nature of matter addressed in dispute. It also emphasizes that the practically effective domain of the TBT Agreement can be expanded if the concept of “mandatory” compliance is extensively applied, introducing some ‘standards’ into the scope of ‘technical regulations’.

Chapter 2. Unstandardized Concept of *Standard*

2.1 *Standards* in Various Contexts

In general, product standards can hardly be defined in a definite term. The term *standard* represents a variety of technical specifications that describe or require characteristics of product or production and process methods.¹ There are a number of ways to classify standards and division criteria most commonly used include their subject matters, ownership, functions or purposes.

The subject matters of product standards vary. They can be primarily product characteristics or certain production or process methods. They can also address certain characteristics of products' marketing, packing, consumption, or even post-consumption such as waste treatment or recycling policy.

In terms of ownership, standards can be generally divided into three categories.² Some standards are established long time ago and so commonly used in modern society that who has established them is sometimes unknown. Some standards are intentionally established by a certain body such as a governmental standardizing body or a non-governmental civic group and provided for public use. These two categories are examples of non-existence of any ownership. However, a third category of some standards include company's internal production know-hows or secretes and producers often claim their ownership toward these standards and demand intellectual property rights over them.

¹ Standards may refer to technical specifications for products or services. In this thesis, however, only product standards are considered and, therefore, the term standard is limitedly referred to product standard only.

² This classification in accordance with standards' ownership is a broad categorization. See generally, Blind (2000).

The study of standards' functions and effects is largely carried out in the field of economics. Some industrial standards are closely related to technological development and facilitate spreads or spillovers of certain technology so that compatibility between products or among systems is enhanced and positive externalities are created within an industry. In this category, standards are perceived as one way of increasing compatibility and production networks, thereby inducing more production efficiency. In the other category, the government usually takes strong initiatives to provide protection for consumers and environment and implement public policies that are generally enacted and enforced based on standards. These days, labeling is considered a useful policy instrument for provision of consumer information since it generally improves consumer welfare by redressing information asymmetry but presumably at a minimum cost.

Standards may pursue a number of different goals. One most common purpose is probably reduction of production cost through easier product compatibility and broader production networks. Another frequently pursued policy is protection of human, animal plant life or health from consumption of products. Recently, a rising objective of production standards is environmental protection and prevention of climate change through various eco-labels and carbon emission labels. Standards are increasingly used to achieve certain goals in a relative passive manner and, in some cases, the ultimate objective may be just information provisions.

As shown above, standards cover a variety of fields, functions and forms. The term *standard*, therefore, cannot be defined in a specific term. Since the word *standard* itself implies a multiple context and situation, its concept can hardly be clearly delineated, which causes a fundamental problem for understanding and interpreting the term 'standard' in the WTO TBT Agreement.

This Chapter examines unstandardized meanings of *standard* in general contexts. It emphasizes diversity of its meanings by showing examples of different definitions and concepts represented in dictionaries, in economics, in language of major international, regional and national standards bodies. In addition, this Chapter particularly shed lights on apparently inconsistent and incoherent use of the term *standard* across different Agreements under the auspice of the WTO regime.

2.1.1 General meanings of *standard*

The term *standard* is used in a variety of contexts. The general meaning of a *standard* is “any norm, convention, or requirement” and a *technical standard* is “a formal document that establishes uniform engineering or technical criteria, methods, processes and practices.”³ Despite its various contextual meanings, the primary meaning of *standard* is “a level of quality or attainment” or “something used as a measure, norm, or model in comparative evaluations.”⁴

According to the definition by the International Organization for Standards (ISO), a *standard* is “a document that provides, requirements, specifications, guidelines or characteristics that can be used consistently to ensure that materials, products, processes and services are fit for their purpose.”⁵ It is followed by a note stating, “[s]tandards should be based on the consolidated results of science, technology and experience, and aimed at the promotion of optimum community benefits”.⁶ On the contrary, technical regulation is defined as “regulation that provides technical requirements, either directly or by referring to or incorporating the content of a standard, technical specification or code of practice”, which is followed by a note, “[a] technical regulation may be supplemented by technical guidance that outlines some means of compliance with the requirements of the regulation, i.e. deemed-to-satisfy provision.”⁷

International Electrotechnical Commission (IEC), another international standardization organizations particularly devoted to electrical, electronic and related technology standards, defines a *standard* as “a document, established by consensus and approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for activities or their results, aimed at the achievement of the optimum degree of order in a given

³ Searched on “standard” and “technical standard” in Wikipedia. < www.wikipedia.org >

⁴ Definition of “standard” in Oxford Dictionaries of English. < oxforddictionaries.com >

⁵ ISO (2004), para 3.2. The ISO (International Organization for Standardization) was founded in 1947 and is now the world’s largest organization for developing international standards covering all aspects of technology and business. It has developed almost 20,000 international standards in respect of a variety of aspects ranging from food safety to various products and technologies to business practices and services. < www.iso.org/iso/home/standards.htm >

⁶ ISO (2004), para 3.2.

⁷ ISO (2004), para 3.6.1.

context.”⁸ European Standards (EN) similarly defines a *standard* as “a publication that provides rules, guidelines or characteristics for activities or their related results, for common and repeated use.”⁹

A more concrete explanation on a *standard* is found in a background paper for the sub-committee on Standards and Conformance of the Asia-Pacific Cooperation (APEC), which states that “standards, that is written or documentary ... include specifications, regulations and procedural requirements. Adherence to standards can be either to voluntary documents or to mandatory regulations and laws. Documentary standards are written by international organizations, national standards bodies, regulatory authorities, and trade and industry associations with the active participation of stakeholders including technical experts from industry, government, consumer groups and other affected parties.”¹⁰

Descriptions on the activities of certain domestic standardization entities or information on standards statistics may provide indirect references to what a *standard* means in reality and in practice. American National Standards Institute (ANSI), for instance, announces its goals in two-fold: to strengthen the US competitiveness in the global economy and to assure the safety and health of consumers and the protection of the environment.¹¹ It describes its major role as in the following: “[t]he Institute oversees the creation, promulgation and use of thousands of norms and guidelines that directly impact businesses in nearly every sector: from acoustical devices to construction equipment, from dairy and livestock production to energy distribution, and many more.”¹²

⁸ The IEC (International Electrotechnical Commission) was founded in 1906, and is now the world’s leading organization for the preparation and publication of International Standards for all electrical, electronic and related technologies. < www.iec.ch/standardsdev/publications/is.htm >

⁹ The European Standards (EN) is a standard that has been adopted by one of the three recognized European Standardization Organization (ESOs), - namely, European Committee for Standardization (CEN), European Committee for Electrotechnical Standardization (CENELEC) or European Telecommunications Standards Institute (ETSI). < www.cen.eu/cen/products/en/pages/default.aspx >

¹⁰ APEC (2009), p.1.

¹¹ ANSI, a non-governmental standardization body in the US, states that its mission is “to enhance both the global competitiveness of the US business and the US quality of life by promoting and facilitating voluntary consensus standards and conformity assessment systems, and safeguarding their integrity.” < www.ansi.org/about_ansi/overview/overview.aspx?menuid=1 >

¹² ANSI has a dozen of specific standardization panels in respect of such state of the art areas as energy efficiency, homeland defense and security, identity theft prevention and identity management, nanotechnology standards, nuclear energy standards, electric vehicle standards, chemical regulation, biofuel standards, and healthcare information technology standards.

Another example also shows that standards include not only standards of private bodies but also standards referred in the government regulations. A US publication often states that, in the US alone, there are more than 93,000 *standards* produced and almost 700 domestic standardization organizations as of 1996, among which the federal government produced the largest number of standards as a single body, that is, more than 44,000 and other private bodies together about 49,000 standards.¹³ This implies that the term *standard* sometimes includes not only mandatory government regulations and specifications but also voluntary standards developed by private entities.

2.1.2 Meanings of *standard* in economics

In economics, a *standard* is generally defined in terms of its economic effects. In a very broad sense, the fundamental purpose of standard is to reduce variety to enhance efficiency. Therefore, anything that basically reduces diversity and, in turn, provides an agreed model for a wide use may be considered a standard.

In this field, standards are generally classified into four broad categories: “unsponsored standards”, “sponsored standards”, “standards from voluntary standardization development organizations” or sometimes referred to as “formal standards” or “committee standards” and “mandatory standards” or “regulations” of government regulatory authorities.¹⁴ In a glance, this classification is largely based on the question of who is the standardizing entity, a private producer, a public body such as committee or industrial association, or the government.

The category of “unsponsored standards” contains very general and commonly followed norms of the society, whose creators are not known and which has a long evolutionary history. The “sponsored standards” category includes standards which are developed by individuals and, at the same time, protected by proprietary rights. Standards in this category usually refer to those standardized technologies and know-hows invested and developed by firms and legally protected as intellectual properties of them. Examples like patents, copyrights, trademarks are the standards belonging to this group.

Then, the distinction between “formal standards” and “mandatory standards” is somewhat

¹³ Toth (1996), p. 2. Browneller (1984), p. 44.

¹⁴ See Blind (2004), Chapter 6.

similar to the one between voluntary ‘standards’ and mandatory ‘technical regulations’ in the TBT Agreement. In economics, the category of “formal standards” refers to the group of standards which are established by a committee or industrial association for the purpose of network externality and economies of scale. These standards are probably “legally” voluntary, but “in reality” mandatory, participants in the relevant industry will have to adopt them if they are to stay within the system and enjoy the advantage of the system they chose. The cost of having such a standardized system may be an increasing cost of transferring to another competing systems and the choice of which standard to follow is usually left to the decision of the relevant industry or group of actors, which is thus terms as economics of “club”.¹⁵

The group of “mandatory standards” includes “regulations” enacted and implemented by the government with a view to fulfill its own policy objectives. This category of standards are termed as “mandatory *standards*” and relevant academic issues and theories are mostly related to such discussions as to when government should intervene and lead the market in developing certain industrial standards. The discussion is related to the degree of positive externalities that a prospective standard would produce and the cost of lock-in. However, it does not directly deal with “technical regulations”; general discussions for “regulation” as whole may be relevant to the theories of “technical regulations”.

2.2 Concepts of “Standard” in the WTO Agreements

2.2.1 Overview

The term *standard* is mentioned in a number of contexts under the GATT/WTO system but their use and meanings are not consistent with each other and by no means based on any explicit or even implicit consensus. The word *standard* is most frequently and importantly used in the TBT Agreement as one type of the Agreement’s subject matters. In specific, the TBT Agreement covers three sources of technical barriers, namely, ‘technical regulations’,

¹⁵ See David (1990), pp. 3-41.

‘standards’, and ‘conformity assessment procedures’. Here, the term ‘standard’ is used to refer to a specific category of voluntary substantive *standard* for the purpose of the Agreement. Thus, ‘standard’ is defined as a “[d]ocument approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory.” Unlike the meaning of “standard” defined by ISO/IEC Guide 2, which covers both mandatory and voluntary *standards*, ‘standard’ used in context of the TBT Agreement indicates “voluntary” documents only.

Although the term *standard* is primarily and directly addressed by the TBT Agreement, the concept also appears in other Agreements. For example, the Government Procurement Agreement (GPA) also contains the phrase “technical regulations and standards” in its several articles.¹⁶ The term *standard* in this context must be identical to the meanings of ‘standard’ in the TBT Agreement because the definition of “standard” for government procurement as laid out in the footnote to Article VI of the GPA is exactly the same as the definition of ‘standard’ in the TBT Agreement.

Interestingly, the word *standard* in the GATS is used in a slightly different context. For instance, Article VI.4 of the GATS providing disciplines for service related domestic regulation mentions that “[w]ith a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services, the Council for Trade in Services shall, through appropriate bodies it may establish, develop any necessary disciplines...”.¹⁷ It is noted that the phrase “technical standard” appears rather than “technical *regulation*” or “*standard*”. Here, it is ambiguous whether the GATS “technical standard” includes ‘technical regulation’ or ‘standard’ or both or even something totally different from the TBT Agreement concepts.

A close examination shows that the word *standard* sometimes appears alone, i.e., without the adjective “technical”, but always accompanies the similarly phrased context, i.e., in a indicative list of domestic regulations such as authorization criteria, licensing or certification. Therefore, in this sense, GATS “technical standards” and “standards” are probably different from the concept of TBT Agreement ‘standards’. Rather, it may be more appropriate to

¹⁶ Agreement on Government Procurement (GPA), Article V, VI, XV, and XIX.

¹⁷ General Agreement on Trade in Service (GATS), Article VI.4.

understand the GATS terminologies in the context of the provisions for “domestic regulations” and with more weight on the reference to the concept of TBT Agreement ‘technical regulation’.

However, even within the GATS, the word *standard* does not appear to be used consistently. In some other contexts, the term *standard* appears in a phrase “international standard”. The expression “international standard” in the context of GATS is probably indicating something very similar to the TBT Agreement “international standards” and, therefore, the meaning of “standard” in GATS and that of the TBT ‘standard’ are probably the same in this context.

In other contexts of the GATT/WTO Agreements, the word *standard* seems to have more general meanings and the meaning of it contains little substantive concept in its specific context. In one context, the term *standard* is used as a noun, generally expressing a “requirement, specification, or criteria”. For instance, the footnote to Article 3.1 of the Subsidy Agreement states which states ‘[t]his *standard* is met when the facts demonstrate that ...’ is referring to the main text “(a) subsidies contingent, in law or in fact” and the word “standard” in this context probably means “criteria or requirement” in general.

A little awkward use of the term *standard* appears in the TRIPS. The word *standard* appears in the title of Part II, which reads, “Standards concerning the availability, scope and use of intellectual property rights”. Since the chapter provides specific obligations for each intellectual property such as copyrights, trademarks, geographical indications, industrial standards, patent, layout-designs (topographies) of integrated circuits, protection of undisclosed information, and control for anti-competitive practices in contractual licenses, it is appropriate to understand “standard” in TRIPS as meaning requirement, specification, or criteria in general sense.

Sometimes, the word *standard* is used as an adjective followed by some nouns. In such case, it should be understood as meaning something “of a basis, agreed form or practice, or a model”. Such examples may include the phrase “an agreed standard form” in Article 16.4 and “standard practice” in Annex 1.3 and 1.7 of the Antidumping Agreement, and “an agreed standard form” in Article 25.11 and ‘standard practice’ in Annex VI of the Subsidy Agreement.

In addition, there are some other cases where *standard* means a certain approach or

methodology. In the Agreement on Rules of Origin, such expressions as ‘positive standard’ and ‘negative standard’ are used. Although terminated in 1997, the plurilateral Agreement on International Dairy had the word ‘standard’, representing a type of measurement or unit.

In short, the word *standard* is used in a variety of contexts within the GATT/WTO legal text and in different meanings. It primarily indicates one category of technical barriers in the context of the TBT Agreement and the SPS Agreement. However, it is sometimes used interchangeably with a “regulation” as shown in some contexts of the GATS. Also, in other times, it is used as a noun or an adjective based on general dictionary meanings.

Despite that fact that the term *standard* is not consistently used within the legal text, its primary usage is found in the TBT Agreement and it is explicitly defined in the Annex to the Agreement. ‘Standard’ in the TBT Agreement is one category of the Agreement’s subject matters and it constitutes an important concept, delineating the coverage of the Agreement along with the other two categories of technical barriers, ‘technical regulation’ and ‘conformity assessment procedures’.

2.2.2 Boundaries of the TBT standards

No provision in the TBT Agreement or in any other WTO Agreements disciplining barriers to trade in goods defines what ‘technical barrier’ is. The concept of ‘technical barrier’ is only inferred from three subject matters addressed by the Agreement which are technical regulations, standards, and conformity assessment procedures. The coverage of the TBT Agreement is affirmed by the explanatory note to the Annex 1.2 when it distinguishes the different legal elements of standard in the Agreement from those in the reference ISO/IEC Guide 2, stating that “[t]his Agreement deals only with technical regulations, standards and conformity assessment procedures related to products or processes and production methods.

In a general sense, technical regulations, standards and conformity assessment procedures all take a form of *standard* since they constrain excessive diversity and limit product characteristics or product methods to a certain specified scope. From this perspective, technical regulations and standards can be simply considered as some substantive *standards* while conformity assessment procedures as some procedural *standards*. Then, technical regulations and standards are divided based on their compliance character; if the compliance

is mandatory, that *standard* is ‘technical regulation’ within the meaning of the TBT Agreement; and if the compliance is voluntary, that *standard* is ‘standard’. Therefore, ‘standard’ defined in the TBT Agreement is not identical to generally used meaning of *standard*, the former being a more specific and narrower category.

The TBT Agreement’s ‘technical regulations’, ‘standards’ and ‘conformity assessment procedures’ should be related to product, or to be more specific, “[a]ll products, including industrial and agricultural products.”¹⁸ Therefore, standards related to services and trade in services are excluded from the regulatory scope of the TBT Agreement but are subject to disciplines of the GATS. The exclusion of services and trade in services is reaffirmed by the introductory clause to the Annex 1, which states the Agreement’s coverage and explicitly mentions that it will give the meaning of terms and definitions “taking into account that services are excluded from the coverage of this Agreement.”¹⁹

Another category of the scope specifically excluded by the TBT Agreement is purchasing specifications by the government for the purpose of government consumption or production procurement. The Agreement clearly states that these government consumption or production specifications should be “addressed in the Agreement on Government Procurement, according to its coverage.”²⁰ Furthermore, the TBT Agreement explicitly rules out application of its disciplines to “measures necessary for the protection of [the Members’] essential security interest.”²¹ Sanitary and phytosanitary measures are particularly ruled by the Agreement on the Application of Sanitary and Phytosanitary Measures, when conformed to its definitions of subject measures.

2.2.3 Service standards in the GATS

The TBT ‘standards’ incorporate only *product* standards. The TBT Agreement expressly limits its scope to products, stating this in Article 1.3 that “[a]ll products, including industrial and agricultural products, shall be subject to the provisions of this Agreement.” Therefore,

¹⁸ Agreement on Technical Barriers to Trade (TBT Agreement), Article 1.3.

¹⁹ TBT Agreement, Annex 1, introductory clause.

²⁰ TBT Agreement, Article 1.4.

²¹ TBT Agreement, the preamble, 7th recital.

the TBT ‘standard’ encompasses all kinds of product standards from manufactures, chemicals, other intermediary parts and components and industrial supplies to agricultural and fishery to food and drink products, both fresh and processed. Moreover, the preamble of the Agreement states its desire to “further the objective of the GATT”, but not of the GATS. This may imply that the TBT Agreement ‘standard’ disciplines are to enhance multilateral trade in goods only, but not multilateral trade in services.

The boundary for the operation of the TBT Agreement against the subject matters related to service standards is more overtly pronounced in the Annex 1 to the Agreement, where the meaning of the terms are generally given for the purpose of the Agreement in accordance with Article 1.2. The introductory clause to the Annex 1 adopts the sixth edition of “the ISO/IEC Guide 2: 1991, General Terms and Their Definitions Concerning Standardization and Related Activities” as a primary reference for the meanings of the terms in the TBT Agreement. According to the clause, the terms presented in the Guide shall have the same meaning when used in the TBT Agreement. Then, the clause explicitly excludes service standards from the scope of the TBT Agreement based on a phrase, “taking into account that services are excluded from the coverage of” the Agreement.

In addition, the definitions of technical regulation and standard in Annex 1.1 and 1.2, respectively, implies that the Agreement is applied to products and product characteristics, implying that service standards are excluded. For instance, Annex 1.1 defines technical regulation as a document which lays down “*product* characteristics or their related processes and production methods....(emphasis added)” Another clear evidence for the exclusion lies in the explanatory note to Annex 1.2, the first two sentences of which read, “[t]he terms as defined in ISO/IEC Guide 2 cover products, processes and services. This Agreement deals only with technical regulations, standards and conformity assessment procedures related to product or process and production methods.”

2.2.3.1 The GATS scope of service standards

The task of defining services and trade in services is very daunting and difficult.²² So is

²² There have long been attempts to define “service” and “trade in services” as well as their difference from

the task of defining service standards. Since service standards are certain requirements and criteria for services, it is inevitable to first deal with what services are and what constitutes them.

In the GATS, the ‘services’ are not expressly defined but only their four modes of supplies are laid out. There is general understanding from economic perspective that ‘services’ are, in nature, intangible or invisible, non-durable or transitory, and/or produced and consumed simultaneously. However, these characteristics are not exclusive and any consensus has not been reached. Therefore, there was an issue during the Uruguay Round negotiations and in several GATS disputes like Canada-Periodicals, Canada-Autos and China-Audiovisual, over the question of whether to extend the scope of the GATS final service products to service factors used for any production.²³ Furthermore, there is a complex issue of how to consider services that are embodied in goods as a medium for the delivery of the service. The AB in China-Audiovisual addressed this issue and concluded that services embodied and delivered in goods are considered goods and governed by GATT rather than by GATS.

Neither does the GATS provide any explicit provisions for defining service standards. However, a few provisions contain some rules and obligations for quality requirements and technical standards. For example, Article VI of the Agreement stipulates certain procedural and built-in obligations concerning certain types of service standards. Specifically, Article VI.4 ensures that domestic regulations relating to “qualification requirements and procedures, technical standards and licensing requirements” should not constitute unnecessary barriers to trade in service and, with a view to prevent unnecessary ‘technical’ barriers, the Article allows future development of any necessary disciplines by the Council for Trade in Service, through appropriate bodies it may establish.

Based these provisions, service standards may be defined and distinguished from product standards for the purpose of this study. From the provision, it may be inferred that service standards appeared in the GATS include only domestic regulation-type standards or mandatory government-made standards. First of all, the scope of the GATS does not include any standards adopted by non-government body. Also, since it would be impossible for a

“goods” and “trade in goods”. For this discussion, generally see: Bhagwati (1991), Chapter 14; Daniels (1993), pp. 1-23; Feketecky (1988).

²³ Marconini (1990), pp. 20-21

domestic regulation to be voluntary in terms of its compliance, it may be appropriate to view that the scope does not include government voluntary standards, either.

2.2.3.2 The GATS disciplines for service standards

Article VI.4 requires qualification requirements and procedures, technical standards, and licensing requirements to be transparent, not more burdensome than necessary, and, in case of licensing procedures, not, in themselves, restrictive on the supply of the service. Article VI.5 also requires that Members shall not apply licensing and qualification requirements and technical standards that nullify or impair such specific commitments they have undertaken for sectors. Specifically, the Article further states that those service standards should not nullify or impair those specific commitments in a manner which does not comply with provisions of Article VI.5 and could not reasonably have been expected at the time the specific commitments in those sectors were made. However, international standards of relevant international organizations shall be taken into account when determining whether a Member is nullifying or impairing the specific commitments.

Similarly with the provisions of the TBT Agreement, or Article 6 in particular, the GATS also encourages Members to recognize the quality of certain services to be equivalent to their own. For instance, Article VII.1 states that a Member may recognize “the education or experience obtained, requirements met, or licenses or certifications granted in a particular country” in their procedures to fulfill, in whole or in part, of its standards or criteria for the authorization, licensing or certification of services suppliers. However, in recognizing service standards of another Member, a Member shall not discriminate between countries or impose a disguised restriction on trade in services based on Article VII.3. Furthermore, Article VII.5 encourages Members to work in cooperation with relevant intergovernmental and non-governmental organizations towards the establishment and adoption of international standards and criteria for recognition as well as international service standards.

In GATS Annex on Telecommunications, Article 4 imposes transparency obligations as regards to relevant information on conditions affecting access to and use of public telecommunications transport networks and services. In specific, the Article requires each Member to make publicly available such information as tariffs and other terms and conditions

of services, specifications of technical interfaces with such network and services, information on bodies responsible for the preparation and adoption of standards affecting such access and use, conditions applying to attachment of terminal or other equipment, and notifications, registration or licensing requirements, if any.

Like in any other Agreements concerning technical barriers, the Annex also emphasizes the importance of international standards for global compatibility in Article 7. It specifically stipulates that Members recognize such importance and undertake to promote such standards through the work of relevant international bodies, including the International Telecommunication Union and the International Organization for Standardization.

2.2.4 Government procurement standards in the Agreement on Government Procurement

The TBT Agreement explicitly excludes standard issues for government procurement from its scope of application. Article 1.4 stipulates, “[p]urchasing specifications prepared by governmental bodies for production or consumption requirements of governmental bodies are not subject to [the TBT] Agreement but are addressed in the Agreement on Government Procurement, according to its coverage.” Therefore, any technical standards quality requirements for government purchase have to comply with obligations of the Agreement on Government Procurement(GPA).

Nevertheless, standards for the government procurement have large influence on the supply side of a market. The government procurement plays an important role in markets not only in terms of the size of transaction, but also through the ‘secondary’ function or effect of the government choice for the counterpart.²⁴ The purpose of government procurement may range widely from direct need of certain public facilities and equipment to indirect intent to promote and disseminate certain social, political or economic values. For example, the government sometimes uses the procurement policy instrument to promote environmental protection, labor rights protection, human rights consideration, social responsible corporates as well as to protect a dwindling industry or to restrict security issues. In reality, many

²⁴ Kunzlink (1999), Chapter 11.

advanced countries such as the US adopt certain government procurement criteria in order to show their concerns over political, social or economic issues in other countries.

Therefore, government procurement standards are separately addressed by the GPA. There is important legal loophole regarding the coverage of non-GPA members. In other words, the TBT Agreement clearly excludes government procurement standards from its scope while the GPA is applied only to the WTO members which have accepted it. Consequently, government procurement standards adopted and implemented by non-GPA member countries are excluded and left unregulated by any of the regime.²⁵

2.2.4.1 The GPA scope of government procurement standards

Article VI of the GPA rules for technical specifications. The first provision of the article implies that procurement standards mean technical specifications which lay down “characteristics of the product or services to be procured, such as quality, performance, safety and dimensions, symbols, terminology, packaging, marking and labelling, or the processes and methods for their production and requirements relating to conformity assessment procedures prescribed by procuring entities...” Thus, standards for government procurements under the GPA basically incorporate both product and service standards, both final product (service) and process and production method standards, and both substantive requirement and procedural assessment requirement by procuring entities. Similarly with the scope of TBT Agreement, GPA’s temporal scope incorporates the preparation, adoption or application of the procurement standards as a whole.

Therefore, the concept of “standard” in the GPA is much broader than the concept of ‘standard’ in the TBT Agreement since the former extends its scope to cover service standards as well as conformity assessment procedures. Also, for the government procurement “standards”, it is almost meaningless to distinguish mandatory standards and voluntary standards since standards applied as terms of government procurement will always have compulsory power for the suppliers.

²⁵ Wolfrum (2007), p.185.

2.2.4.2 The GPA disciplines for government procurement standards

The Article stipulates very similar rules and obligations for procurement standards as those of the TBT Agreement. Most importantly, it provides the least-trade-restrictive principle. According to the phrase, “shall not be prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade”, procuring entities should take into consideration de jure and de facto trade-restrictive effect of their procurement standards and be responsible for any unnecessary trade barriers resulting from their procurement standards.

In Article VI.2, the GPA aims to minimize the trade barriers arising from the government procurement standards through the obligations to base procurement standards on their performance rather than their design or descriptive characteristics, to harmonize them with international standards if possible or otherwise with their national standards, either technical regulations or standards, or building codes.

Article VI.3 refrains procuring entities from using a particular trademark or trade name, patent, design or type, specific origin, producer or suppliers as their requirement or reference except in the case where “there is no sufficiently precise or intelligible way of describing” their procurement standards and, in such case, word such as “or equivalent” should be included in their tender documentation. Thus, the GPA tries to minimize arbitrary or discriminatory procurement standards. Furthermore, Article VI.4 stipulates that procuring entities shall not seek or accept, in a manner that have the effect of precluding competition, advice for procurement standard from a firm that may have a commercial interest in the procurement.

2.2.5 Sanitary and phytosanitary standards in the SPS Agreement

The TBT Agreement clearly excludes Sanitary and Phytosanitary (SPS) measures from its scope by explicitly stipulating in Article 1.5 that “[t]he provisions of [TBT Agreement] do not apply to sanitary and phytosanitary measures as defined in Annex of the Agreement on the Application of Sanitary and Phytosanitary Measures.” In conjunction with the provision, Article 1.4 of the SPS Agreement states, “[n]othing in [the SPS] Agreement shall affect the

rights of Members under the Agreement on Technical Barriers to Trade with respect to measures not within the scope of the SPS Agreement.” Therefore, it can be inferred that the TBT Agreement governs all technical barriers, substantive technical regulations and standards or procedural conformity assessment standards, except for sanitary and phytosanitary measures as defined in the SPS Agreement.

In disputes, the DSB first examines whether a certain measure is SPS measure or not, and, if it is so, the SPS agreement applies first. If no violation is found under the SPS Agreement, the dispute is further reviewed under the TBT Agreement and subsequently under the GATT. In *EC-Hormones (US)* dispute case, the Panel found that the SPS Agreement was applicable, but not the TBT Agreement, to the dispute since the measures in dispute were sanitary measures. Also, a product-related SPS measure is subject to the related GATT provisions. In *EC-Biotech Products* case, complaining parties claimed under both the provisions of the SPS Agreement and those of the TBT Agreement and the Panel decided to first review under the SPS Agreement and then review under the TBT Agreement ‘to the extent it is necessary to do so.’²⁶ In general, a SPS measure is ‘a special tool for the regulation of a very narrow but special category of technical barriers to trade’ and is *lex specialis* to the TBT Agreement.²⁷

In their legal text, both the TBT Agreement and the SPS Agreement clearly state their relations with each other and these provisions are generally interpreted that, in case where a product-related SPS measure is concerned and both Agreements are applicable, the SPS Agreement overrides the other. The SPS Agreement deals with a special category or subset of the measures which are subject to the TBT Agreement in a broad sense and the definitions of a SPS measure determines the boundary of the SPS subgroup of the TBT measures, which are excluded from the operation of the TBT Agreement but primarily governed by the SPS Agreement.

2.2.5.1 The SPS Agreement scope of sanitary and phytosanitary standards

According to Article 1.1 of the SPS Agreement, the scope of the SPS Agreement is all sanitary and phytosanitary measures which may, directly or indirectly, affect international

²⁶ Panel Report, *EC- Biotech Product*, para. 7.1671-7.1679.

²⁷ Wolfrum (2007), p. 185.

trade. Annex A.1 of the SPS Agreement defines sanitary or phytosanitary measures as any measure of the following: (a) to protect animal or plant life or health within the territory of the Member from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organism; (b) to protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs; (c) to protect human life or health within the territory of the Member from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests; or (d) to prevent or limit other damage within the territory of the Member from the entry, establishment or spread of pests. Accordingly, SPS measures are measures to protect life or health of animal, plant or human from risks arising from diseases, poisons or other life or health damage.

Annex A.1 further stipulates regulatory formalities, providing that SPS measures include “all relevant laws, decrees, regulations, requirements and procedures including, *inter alia*, end product criteria; processes and production methods; testing, inspection, certification and approval procedures; quarantine treatments including relevant requirements associated with the transport of animals or plants, or with the materials necessary for their survival during transport; provisions on relevant statistical methods, sampling procedures and methods of risk assessment; and packaging and labelling requirements directly related to food safety.”

The approaches to defining subject matters differ between the TBT Agreement and the SPS Agreement. The SPS Agreement defines SPS measures based on their four different regulatory goals, rather than what kind of policy instrument they incorporate. In other words, SPS measures can be such policy instruments as a quarantine procedure at the boarder or import ban or domestic quality, safety, or content requirements or even information requirements such as labelling. In other words, no matter what policy form it takes, a SPS measures is a measure whose regulatory goal is to protect human, plant or animal life or health from risks arising from various sources stated in the relevant SPS provisions.²⁸

The TBT Agreement also covers measures to protect human, plant or animal life or health or to protect environment. What is critical factor for distinguishing the TBT measure and the

²⁸ Roberts (1998), p. 382.

SPS measure is the ‘risk’ that a specific measure tries to counter. The TBT Agreement governs standards for ‘product characteristics’ whereas the SPS Agreement addresses standards for ‘risk’ prevention or ‘risk’ management.

“Due to this structure of the definition of SPS measures, further difficulties arise when one and the same government regulation serves an SPS purpose and a non-SPS purpose, or addresses an SPS-risk and a non-SPS risk simultaneously. In such instances, the measure should be broken down into its individual component parts and each provision judged according to its regulatory purpose under the TBT or SPS Agreement. In the rare instances in which a government measure cannot be divided into different instances in which a government measure cannot be divided into different parts with respective regulatory purposes, TBT Agreement may apply cumulatively to the extent that the requirements for the application of the SPS Agreement are not fulfilled.”²⁹

2.2.5.2 The SPS Agreement disciplines for SPS standards

The distinction between TBT measures and SPS measures is particularly important since the level of WTO regulatory approach is generally higher in the latter. Several different and more specific legal requirements are found in the SPS Agreement. They are, for instance, Article 5 for risk assessment and appropriate level of SPS protection, Article 3 for harmonization obligation and specific international standards explicitly mentioned in the Article, and Article 6 for adaptation to regional conditions, including pest- or disease-free areas and areas of low pest or disease prevalence.

Under the SPS Agreement, the WTO members have ‘right’ to take SPS measures and the level of SPS measures should be only to the extent ‘necessary for the protection of human, animal or plant life or health.’³⁰ Also, SPS measures should not be applied in a manner which would constitute a disguised restriction on international trade.

Although WTO members are given right to implement SPS measures on their necessity, those measures should be based on scientific principles and is not maintained without

²⁹ Wolfrum (2007), p.186.

³⁰ Agreement on Sanitary and Phytosanitary Measures (SPS Agreement), Article 2.1 and 2.2,.

sufficient scientific evidence.³¹ The Agreement states that SPS measures should be based on risk assessment, as appropriate to the circumstances.³² It further provides that, when assessing risks, Members should take into account risk assessment techniques developed by the relevant international organizations³³ as well as available scientific evidence, relevant process and production methods, relevant inspection, sampling and testing methods, prevalence of specific diseases or pests, existence of pest- or disease-free areas, relevant ecological and environmental conditions, and quarantine or other treatment.³⁴ When assessing the risk to animal or plant life or health and determining the measure to be applied for achieving the appropriate level of sanitary or phytosanitary protection, they also have to consider economic factors, including the potential damage in terms of loss of production or sales in the event of the entry, establishment or spread of a pest or disease, costs or control or eradication in the territory of the importing Member and the relative cost-effectiveness of alternative approaches to limiting risks.³⁵

In cases where relevant scientific evidence is insufficient, a Member may provisionally adopt SPS measures “on the basis of available pertinent information, including that from the relevant international organization as well as from SPS measures applied by other Members.”³⁶ In such circumstances, Members have to seek to obtain the additional information necessary for a more objective assessment of risk and review the SPS measure accordingly within a reasonable period of time.³⁷

Like in the TBT Agreement, non-discrimination obligation applies to SPS measures. The WTO members must ensure that their SPS measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail.³⁸ The non-discrimination obligation extends to between a Member’s own territory and that of other Members.³⁹ In applying the appropriate level of sanitary or phytosanitary protection, Members should avoid applying arbitrary or unjustifiable distinctions in the levels it

³¹ SPS Agreement, Article 2.2.

³² SPS Agreement, Article 5.1, first sentence.

³³ SPS Agreement, Article 5.1, second sentence.

³⁴ SPS Agreement, Article 5.2.

³⁵ SPS Agreement, Article 5.3.

³⁶ SPS Agreement, Article 5.7.

³⁷ SPS Agreement, Article 5.7.

³⁸ SPS Agreement, Article 2.3.

³⁹ SPS Agreement, Article 2.3.

considers appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade.⁴⁰

This non-discrimination disciplines are somewhat different from the GATT principles for MFN and NT, which fundamentally deals with different treatment between like products of different origins.⁴¹ The non-discrimination disciplines in SPS Agreement essentially have taken into consideration different assessment of the like ‘risks’ and discriminatory circumstances based on different biological and toxicological risks assessments. Therefore, risks of different origins incorporates risks of different regions, sub-national units. In line with this, the Agreements allows particularities, in terms of risks, of different regions of a nation, ensuring that Members’ SPS measures are adapted to SPS measures of the area of exporting or importing countries when assessing sanitary or phytosanitary characteristics of a region, and that Members recognize the concepts of pest- or disease-free areas or areas of low pest or disease prevalence.

Like in the TBT Agreement, the SPS Agreement also recognizes the important contribution of international standards, guidelines and recommendations in minimizing the negative trade effects of the SPS measures.⁴² Accordingly, it requires Members’ SPS measures to be harmonized on as wide a basis as possible to international standards, where they exist.⁴³ When a SPS measure conforms to international standards, it is deemed to be necessary to protect human, animal or plant life or health and presumed to be consistent with the relevant provisions of the SPS Agreement and GATT 1994.⁴⁴ Members may introduce or maintain SPS measures whose resulting health, life or environment protection level is higher than that of international standards, if there is a scientific justification, or as a consequence of the level a Member determines to be appropriate, and if they are not inconsistent with any other provisions of the SPS Agreement.⁴⁵

The Agreement requires the WTO members to play a full part, within the limits of their resources, in the relevant international organizations and their subsidiary bodies, in particular

⁴⁰ SPS Agreement, Article 5.5.

⁴¹ Roberts (1998), p. 384.

⁴² SPS Agreement, the preamble, 5th recital.

⁴³ SPS Agreement, Article 3.1.

⁴⁴ SPS Agreement, Article 3.2.

⁴⁵ SPS Agreement, Article 3.3.

the Codex Alimentarius Commission, the International Office of Epizootics, and the International Plant Protection Convention to promote the development and periodic review of international standards.⁴⁶

The Agreement requires the WTO Members to accept SPS measures of other Members as equivalent, even if these measures differ from their own or from those used by others, if the exporting Member objectively demonstrates to the importing Member that its measures achieve the importing Member's appropriate level of sanitary or phytosanitary protection.⁴⁷ For this purpose, the exporting members should provide reasonable access, upon request, to the importing member of inspection, testing and other relevant procedures.⁴⁸ Upon request, members should, enter into consultations to achieve a bilateral or multilateral arrangement for recognition of the equivalence of specified SPS measures.⁴⁹

2.3 Chapter Summary and Partial Conclusion

Standards cover a variety of fields, functions and forms. The term *standard*, therefore, can be hardly defined in specific terms. Since the word *standard* itself implies multiple contexts and situations, its concept can hardly be clearly delineated, which causes a fundamental problem for understanding and applying the term 'standard' for the purpose of operating the WTO TBT Agreement.

Thus, Chapter 2 examines *unstandardized* meanings of *standard* in general contexts. It emphasizes diversity of its meanings by showing examples of different definitions and concepts represented in dictionaries, in economics, and in language of major international, regional and national standards bodies. In addition, this Chapter particularly sheds lights on apparently inconsistent and incoherent use of the term *standard* across different Agreements under the auspice of the WTO regime.

In the GATT/WTO regime, the word *standard* is mainly used to refer to voluntary

⁴⁶ SPS Agreement, Article 3.4.

⁴⁷ SPS Agreement, Article 4.1, first sentence.

⁴⁸ SPS Agreement, Article 4.1, second sentence.

⁴⁹ SPS Agreement, Article 4.2.

‘standards’, one source of technical barriers under the auspice of the TBT Agreement. However, other Agreements also use the term *standard*, but without clearly indicating whether it has the same meaning as the term ‘standards’ used in the TBT Agreement or not. The analysis of this Chapter finds that all the terms “standards” have different meanings and scopes from an Agreement to another, and the explicitly defined meaning of ‘standards’ in the TBT Agreement is not consistently or coherently used in other WTO Agreements. For example, when the word “standards” is used in the GATS and GPA, it generally encompasses very broad meanings and scopes. It probably includes both substantive and procedural standards. Also, the “standards” may refer to products standards or service standards or both depending on the context the term is used.

In addition, it is clear from the analysis of this chapter that none of the contexts in other WTO Agreements, the concept of “standards” is identified as ‘standards’ on the basis of voluntary compliance. Therefore, it seems to be very typical to the case of the TBT Agreement that the term ‘standards’ is defined in terms of voluntary compliance.

Chapter 3. ‘Standards’ Treatment in the WTO TBT Agreement

3.1 Product Standards in the TBT Regime

3.1.1 Standards and Trade

Standards have their own legitimate objectives and functions. In general, they facilitate compatibility between products or between product systems and promote production efficiency. In some cases, they provide consumers with necessary product information and help them make appropriate consumption choice. Standards also play important roles in protecting consumers and environment since they are increasingly perceived as efficient regulatory instruments by government. Thus, standards in themselves do not primarily prevent international trade unless they are adopted under specific protectionist intent.

However, standards do have trade effects. Despite the fact that the trade effects of standards are externalities, standards do create barriers to international trade on the one hand. For example, importing country’s standards often require foreign exporters to bear additional administrative procedures and cost. This is because, frequently, standards in importing countries are different from those in exporting countries and this discrepancy causes additional market entry cost.⁵⁰ The technical trade barriers arising from such heterogeneity

⁵⁰ Several studies have attempted to measure the impact of technical barriers as a whole and generally suggest that there exist negative impact on international trade when technical regulations and standards increase. Most of them are World Bank or OECD working papers such as Maskus (2000) and Beghin (2001) and examples of published journal articles include Gandal (2000), Li and Beghin (2011), and Gebrehiwet (2007). There are a number of studies which suggest negative trade effect of standards on international trade and some general examples include Deardoff and Stern (1998), Calvin and Krissoff (1988), Yue (2006),

particularly incur additional trade costs since they accompany stringent, redundant, overlapping conformity assessment procedures.⁵¹ On the other hand, it is also true that some standards provide foreign exporters with market demand or preference information and thus have positive impact on trade. Or, in some cases, the adoption of a standard promotes domestic export by helping domestic products acquire a certain level of product quality recognized by foreign consumers, thereby creating more global trade. However, more often than they have negative trade impacts. Particularly, importing country's standards constitute trade barriers to foreign exporters due to several reasons.

3.1.2 Standards and the TBT Agreement

Despite the fact that trade effects of standard are inherently unintended and considered externalities in general, some standards and standardization in reality are based on protectionist intent and serve as useful circumvention instruments. Therefore, the GATT/WTO regime establishes the TBT regime based on two fundamental approaches. One is to prevent such protectionist abusive use of technical regulations and standards and the other is to internalize the resulting externalities to trade.

In consequence, the focus of the TBT Agreement is primarily on trade, not on standards *per se*. The Agreement's preamble expresses such desire as to "further the objectives of GATT 1994".⁵² Also, like in other parts of the GATT/WTO regime, the TBT Agreement takes the approach to this delicate issue of adopting the concept of necessary/unnecessary obstacles to trade, recognizing, on the one hand, that "no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices..." and desiring, on the other hand, that technical barriers "do not create unnecessary obstacles to international trade".⁵³

Essaji (2008), Disdier (2008), and many others. Another category of previous studies try to show that international standards help reduce technical barriers and facilitate international trade. Some of these works are Swann (1996) and Moenius (2000).

⁵¹ Sykes (1999), p. 475-480. Sykes (1995), 40-51.

⁵² TBT Agreement, preamble, 2nd recital.

⁵³ Respectively, TBT Agreement, preamble, 6th recital and 5th recital.

The TBT Agreement does not define “technical barriers to trade” even though it expressly indicates the subject matter in its title. Instead, the TBT Agreement identifies the problem of technical barriers based on three sources: ‘technical regulations’, ‘standards’, and ‘conformity assessment procedures’. Again, nowhere in the Agreement the term “technical barriers to trade” has been identified explicitly with these three causes but these three terms as they are repeatedly appearing throughout the TBT Agreement no doubt describes the subject matters of the TBT Agreement and constitutes basic framework of the TBT Agreement. The preamble, for example, mentions that “technical regulations and standards, including packaging, marking and labeling requirements, and procedures for assessment of conformity with technical regulations and standards” do not cause unnecessary barriers.⁵⁴ Furthermore, the entire articles of the TBT Agreement are structured based on these three categories; thus, Articles 2 and 3 are applied to ‘technical regulations’, Article 4 rules ‘standard’ and Article 5 through 9 govern ‘conformity with technical regulations and standards’. Moreover, Article 10 is entitled “Information About Technical Regulations, Standards and Conformity Assessment Procedures” and these three terms are repeated continuously in articles. In addition, Paragraphs 1 through 3 of the Annex 1 to the TBT Agreement define terms of these three categories one by one.

In sum, ‘standard’ in the TBT Agreement is one of the three main causes of technical barriers to trade and is a subject matter of the Agreement’s disciplines. In principle, the Agreement captures ‘standard’ in its scope in order to address its trade-restrictive effect, not directly to regulate ‘standards’ and standardization activities. Therefore, the TBT Agreement’s fundamental approach toward ‘standard’ treatment is two-fold: one is to prevent any protectionist intent hidden behind ‘standards’ and the other is to internalize externalities which are unintentionally resulted from standards and standardizations and consequently hindering international trade. The next section discusses Agreement’s such ‘standard’ treatments in more detail.

⁵⁴ TBT Agreement, preamble, 5th recital.

3.2 ‘Standards’ of the WTO TBT Agreement

3.2.1 The definition of ‘standard’

For the purpose of the TBT Agreement, the meaning of terms used in the Agreement is given in the Annex 1. Annex 1.1 through 1.8 respectively give definitions to such terms as ‘technical regulation’, ‘standard’, ‘conformity assessment procedures’, ‘international body or system’, ‘regional body or system’, ‘central government body’, ‘local government body’ and ‘non-government body’ in the TBT Agreement.⁵⁵

The meanings and definitions of these terms are basically applied with the same meanings and definitions of the ISO/IEC Guide to the extent that the definitions in Annex provide different legal elements. To this end, Annex 1 begins with an introductory clause, which affirms that terms presented in the TBT Agreement have the same meaning and definitions as those presented in the sixth edition of the ISO/IEC Guide 2:1991, if not otherwise defined in the Annex.⁵⁶ Also, it clearly states that general terms for standardization and conformity assessment procedures will normally have the meaning given by the United Nations system and by international standardizing bodies, taken into account their context and in light of the object and purpose of the TBT Agreement.⁵⁷

The TBT Agreement covers three sources of technical barriers: ‘technical regulation’, ‘standard’ and ‘conformity assessment procedure’. Each of them is defined in Annex 1 to the TBT Agreement.

Technical regulation is defined in Annex 1.1 as,

“[d]ocument which lays down characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging marking or labelling requirements as they apply to a product, process or production

⁵⁵ TBT Agreement, Annex 1.

⁵⁶ TBT Agreement, Annex 1, introductory clause.

⁵⁷ TBT Agreement, Article 1.1.

method.”⁵⁸

The explanatory note to the definition stipulates, “[t]he definition in ISO/IEC Guide 2 is not self-contained, but based on the so-called “building block” system”.

The definition of ‘standard’ follows as,

“[d]ocument approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method”.⁵⁹

The definition of ‘standard’ given in the Annex 1.2 is subsequently compared, in the explanatory note, with the definition of standard in the ISO/IEC Guide 2. Although the ISO/IEC Guide 2 defines a “standard” to cover products, processes and services, the TBT Agreement deals only with technical regulations, standards and conformity assessment procedures that are relevant to products or processes and production methods.⁶⁰ In addition, “standards” defined in the ISO/IEC Guide 2 encompass both mandatory and voluntary standards while ‘standards’ defined for the purpose of the TBT Agreement incorporate only voluntary standards.⁶¹

The first two categories, i.e. ‘technical regulations’ and ‘standards’, are substantive requirements while the third source of technical barriers, i.e. ‘conformity assessment procedures’ is procedural requirement to prove that the above-mentioned substantive requirements are fulfilled and complied. Thus, the definition of ‘conformity assessment procedures’ as provided for in Annex 1.3 states,

⁵⁸ TBT Agreement, Annex 1.1.

⁵⁹ TBT Agreement, Annex 1.2.

⁶⁰ TBT Agreement, Annex 1.2, first and second sentences of the explanatory note.

⁶¹ TBT Agreement, Annex 1.2, third and fourth sentences of the explanatory note.

“[a]ny procedure used, directly or indirectly, to determine that relevant requirements in technical regulations or standards are fulfilled.”

This definition is followed by an explanatory note which gives more concrete ideas about what may constitute conformity assessment procedures. The note provides,

“[c]onformity assessment procedures include, inter alia procedures for sampling, testing and inspection; evaluation, verification and assurance of conformity; registration, accreditation and approval as well as their combinations.”

Thus, it is limited to tests and inspections in general during the process of evaluation whether a certain product has fulfilled substantive requirements set out in a technical regulation or standard.

The definition of ‘standard’ as provided for in Annex 1.2 resembles with ‘technical regulation’ in several aspects. Both ‘standards’ and ‘technical regulations’ mean “document” that provide for some product characteristics or their process or production methods. Also, both definitions cover a wide range of subject matters including terminology, symbols, packaging, marking or labeling requirements. In *US-Tuna II*, the AB confirms this by stating,

“...the subject matter of a particular measure is ... not dispositive of whether a measure constitute a technical regulation or a standard. Instead, “terminology”, “symbols”, “packaging”, “marking”, and “labeling requirements” may be the subject-matter of either technical regulations or standards.”⁶²

However, the respective definitions of ‘standards’ and ‘technical regulations’ are different from each other in respect of the legal element “compliance” type. The compliance with

⁶² Appellate Body(AB) report, *US-Tuna II*, para. 187,

‘standard’ is required to be “not mandatory” or, this is to say, voluntary whereas the compliance with ‘technical regulation’ is required to be mandatory.

Table 1. Legal Elements of Technical Regulations and Standards

	Technical Regulation	Standard
Subject Person	<ul style="list-style-type: none"> ▪ Central government body ▪ Local government body ▪ Non-Government body 	<ul style="list-style-type: none"> ▪ A recognized body
Subject Measure	<ul style="list-style-type: none"> ▪ Document ▪ Lays down product characteristics or their related process and production methods, ▪ Including applicable administrative provisions ▪ It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirement. 	<ul style="list-style-type: none"> ▪ Document ▪ Provides...rules, guidelines or characteristics for products or their related process and production methods ▪ For common and frequent use ▪ It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirement.
Compliance	<ul style="list-style-type: none"> ▪ Mandatory 	<ul style="list-style-type: none"> ▪ Not mandatory

Source: Author’s analysis

Overall, as shown in <Table 1>, the coverage and legal elements of ‘standard’ are basically identical with those of ‘technical regulation’ except for the compliance requirement. This legal element of compliance is the most critical element which distinguishes ‘standard’ from ‘technical regulation’ for the purpose of the TBT Agreement.

In the following section, each of the legal elements that are found in the definition of ‘standard’ is discussed. These legal elements include “product characteristics”, “production and process methods”, “for common and frequent use”, and “approval by a recognized body”. The discussion will also consider some features that are common with or different from ‘technical regulation’. The meaning and actual interpretation of the concept “compliance” will be rigorously discussed in Chapter 5 and Chapter 6.2.

3.2.2 A legal requirement of “product characteristics”

The concept of ‘standard’ covers standards for product or process and production method.

It also covers, on the whole or in part, some terminology requirements, symbols, packaging, marking or labelling requirements. The same coverage is found in the definition of ‘technical regulation’ and, therefore, these subject matters of ‘standard’ are generally identically interpreted and applied with those of ‘technical regulation’.

In *EC-Asbestos*, the panel had to determine whether the TBT Agreement could be applied to the French ban on the use of asbestos at dispute. In its analysis, the panel noted that the word “product” in the definition in Annex 1.1 of the Agreement should be interpreted based on the principle of effectiveness.⁶³ The panel briefly considered a possibility that the word ‘product’ had been used to indicate that the definitions were related to products rather than services. However, the Panel noted that the TBT Agreement’s coverage over “trade in goods” has been already mentioned in Article 1 and, therefore, concluded that the term “product” would probably meant to pursue another objective.⁶⁴ The Panel went on to say that the purpose of using the word “product” was ‘to create a link between the technical characteristics and one or more given products’. The Panel emphasized that the word “product” is related to the characteristics provided in the document and, therefore, concluded that “the product(s) to which the characteristics refer must be clearly identifiable in the document in question”.

3.2.3 An issue of PPM ‘standard’

The issue of production and process method (PPM) has long been debated under the GATT/WTO system. Since the GATT 1947 mentions only “product”, not PPM, a past debate has been devoted to the question of whether the scope of “product” in GATT could be interpreted in an extensive way to include PPMs of product.

The PPM issue now under the TBT regime has a different focus. Unlike the issue of PPM under the GATT 1947 in which only the word “product”, not “production and process method”, was explicitly mentioned in the legal text, the TBT Agreement contains both words,

⁶³ Panel report, *EC-Asbestos*, para. 8.36.

⁶⁴ Panel report, *EC-Asbestos*, para. 8.37.

“product” and “production and process methods” and, therefore, the TBT Agreement’s coverage over PPM is certain.

The essential question now is how far the PPM is covered. The term PPM can be defined as “the ways in which and techniques by which a product is manufactured or produced, or a natural product is extracted or captured”.⁶⁵ Also, PPM measures are generally divided into two categories, i.e. product-related PPMs and non-product-related PPMs, and it is debated over whether the TBT Agreement covers only product-related PPMs or both product-related and non-product related PPMs.⁶⁶ The question becomes more complicated because although both definitions of ‘standard’ and ‘technical regulation’ cover not only “product” characteristics but also “processes and production methods”, the phrases used with respect to these two subject matters differ in ‘standard’ definition from ‘technical regulation’ definition.

The result of the determination will lead to significant consequence in practice since, recently, the increasing number of standards is dealing with non-product related PPMs such as requirements for workers’ human rights and environment protection and pollution reduction during the process and production stage. The consequence of the determination also involves north-south debate since a majority of non-product-related PPM standards are adopted and applied by the developed countries in their market and developing countries which are usually the exporters who must comply with the developed countries’ non-product-related PPM standards face challenges and difficulties, even asserting that the developed countries support the TBT Agreement’s coverage over non-product-related PPM in order to pursue protectionist intents.

To date, there has been no definite conclusion as to this new PPM issue – whether the TBT Agreement covers non-product-related PPMs or not. However, the WTO Committee on Trade and Environment has once reached a kind of consensus that the TBT Agreement does not cover non-product-related PPMs.⁶⁷

As mentioned above, although both definitions of ‘standards’ and ‘technical regulations’ covers PPM measures, their phrases are slightly different. According to their respective definitions, a document of ‘technical regulation’ lays down “product characteristics or their

⁶⁵ Wolfrum (2007), p. 195.

⁶⁶ Wolfrum (2007), pp. 195-6.

⁶⁷ See Joshi (2004) and Chang (1997).

related processes and production methods” whereas a document of ‘standard’ provides “characteristics for products or related processes and production methods”. Therefore, one argues that the PPMs for ‘technical regulation’ are related to “product *characteristics*” whereas, the PPMs for ‘standard’ are relevant to “products”. These elements may lead to a conclusion that a ‘technical regulation’ covers characteristics-related PPMs regardless of whether they are product-related or non-product-related whereas a ‘standard’ covers only product-related PPMs. Based on this interpretation, the scope of a ‘standard’ does not incorporate non-product-related PPMs standard and, in this sense, is narrower than the scope of a ‘technical regulation’.

Another aspect of the PPM issue in the TBT Agreement is also highlighted when the second sentence in the respective definitions is considered. The both second sentences identically read, “[i]t may also include or deal exclusively with... labeling requirements as they apply to a product, process or production method”. Interpreting this second sentence as an additional description of the TBT Agreement subject matter, one group argues that “labeling requirements... to... process or production method” possibly incorporates both product-related and non-product related PPMs.⁶⁸ In contrast, the other group of scholars considers that the first sentence in respective definitions of ‘standard’ and ‘technical regulation’ generally describes the subject matter and the second sentence suggests a list of examples, thereby concluding that the general scope is limited to products or product-related PPMs and, therefore, any one of the listed subject matters, including labeling extends only to the limit of products or product-related PPMs.⁶⁹ These two aspects of TBT Agreement’s PPM issues are summarized and illustrated in <Figure 2>.

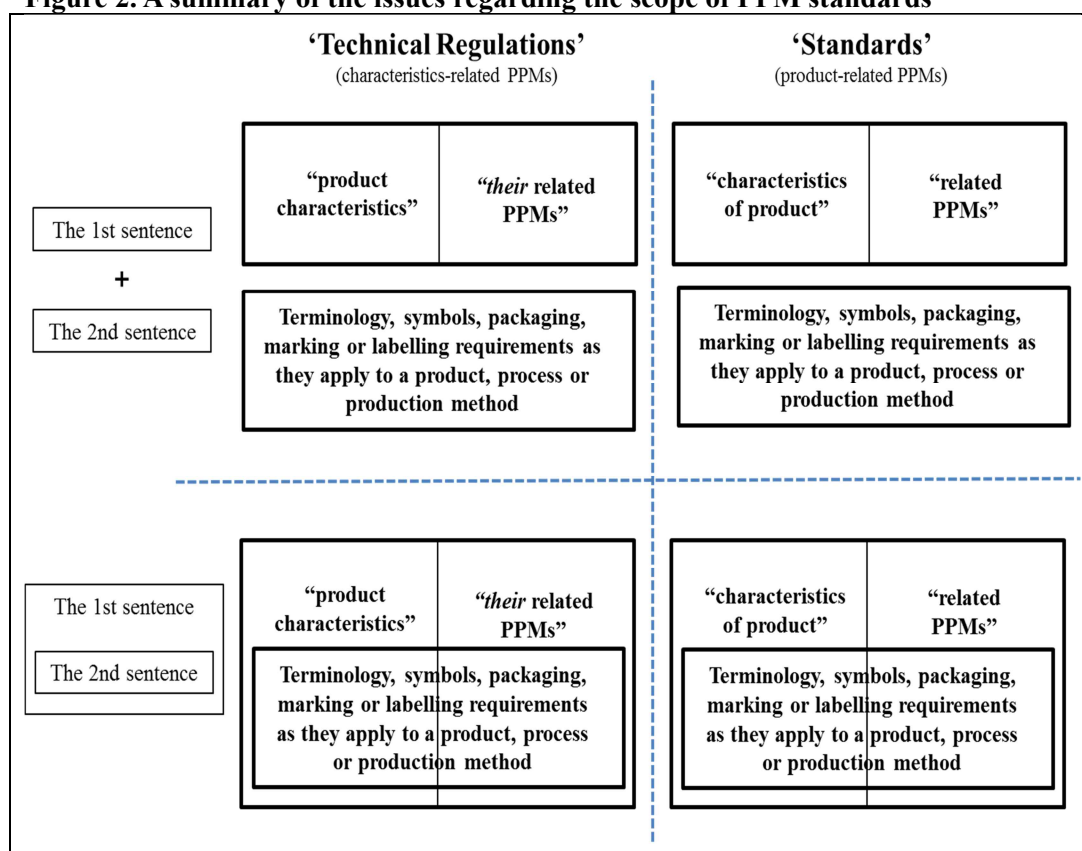
In *US-Tuna II* dispute, the measure at issue was a US tuna labeling scheme which had been adopted to protect dolphins in the process of fishing, i.e. producing, tuna. Therefore, the measure was a kind of PPM eco-labeling scheme, particularly, non-product-related PPM eco-labeling scheme. In the Panel proceeding, the second element of the three-tier test in determination of a ‘technical regulation’ was relevant to this PPM related question but this issue was not actually disputed in that case. The question actually disputed between parties was whether the measure at dispute addressed “product characteristics” or not and the Panel

⁶⁸ Bartenhagen (1997), p.74.

⁶⁹ Staffin (1996), p. 238.

described this question for its analysis as “whether the matter addressed in the US dolphin-safe labeling provisions falls within the scope of the subject matters of a technical regulation”.⁷⁰

Figure 2. A summary of the issues regarding the scope of PPM standards



Source: Author’s analysis

Then, in its analysis, the Panel first clarified the relationship between the first sentence and the second sentence. It noted that both sentences in Annex 1.1 provide “indications as to the subject matter, or contents, of technical regulations”, the first sentence establishes that a

⁷⁰ Panel report, *US-Tuna II*, para. 7.71.

technical regulation “may lay down ‘product characteristics *or* their related processes and production methods’”(emphasis in original text), and the second sentence “further elaborates on the subject-matter of technical regulations, and enumerates some specific items that technical regulations may also ‘include or deal exclusively with’”.⁷¹ From these elements, and as well as the disputants’ agreement that the US measure at dispute establishes “labeling requirements” for “dolphin-safe” applied to both a product – tuna product– and a production method, the Panel concluded that the subject-matter fell within the scope of the second sentence of Annex 1.1. Having found this, the Panel considered it unnecessary to examine further whether the US dolphin-safe labeling provisions also fell within the scope of the first sentence as “product characteristics or related production or processing methods”.⁷²

Although it did not explicitly endorse the interpretation of the Panel, the AB seems to have taken a similar approach with the Panel. Regarding the subject matter of a technical regulation, it noted that the second sentence “further states” what a technical regulation may include or deal exclusively with. By this, it is implied that the second sentence provides a separate set of subject matters in addition to “product or their related process and production methods” in the first sentence. Moreover, the AB did not question whether the US labeling scheme addressed “product characteristics” and thus fell within the scope of a technical regulation when it was examining for legal characterization of the measure at issue.

⁷¹ Panel report, *US-Tuna II*, para. 7.72. For this analysis, the Panel noted a Appellate Body’s statement in *EC-Asbestos* as relevant, which states,

“[i]n addition, according to the definition in Annex 1.1 of the *TBT Agreement*, a ‘technical regulation’ may set forth the ‘applicable administrative provisions’ for products which have certain ‘characteristics’. Further, we note that the definition of a ‘technical regulation’ provides that such a regulation ‘may also include or deal *exclusively* with terminology, symbols, packaging, marking *or* labeling requirements’... The use here of the word ‘exclusively’ and the disjunctive word ‘or’ indicates that a ‘technical regulation’ may be confined to laying down only one or a few ‘product characteristics’.”(emphasis in original text).” (AB report, *EC-Asbestos*, para. 67)

The Panel was assured by the AB’s statement above, which has observed that “the terms of the second sentence make it clear that the subject-matter of a technical regulation may be confined to one of the items enumerated in the second sentence”. (Panel report, *US-Tuna II*, para. 7.79) The Panel noted that the AB has also determined that “labeling requirements”, as well as other items described in the second sentence of Annex 1.1, constitute “product characteristics” within the meaning of the first sentence. (Panel report, *US-Tuna II*, footnote 251)

⁷² Panel report, *US-Tuna II*, footnote 251. The Panel noted that the AB has also determined that “labeling requirements”, as well as other items described in the second sentence of Annex 1.1, constitute “product characteristics” within the meaning of the first sentence.

The determination of the dispute implies, therefore, that the scope of a mandatory “labeling requirements” is not just limited to product-related PPMs but also extends to cover non-product-related PPMs. In this dispute, the disputing parties did not fight over legal characterization of a technical regulation in terms of the element “product characteristics”. However, it still remains unresolved that how far the meaning of “product *characteristics*” can be stretched out. A relevant consideration would be whether the extent of non-product-related PPMs can incorporate labels for certain human rights claims, for instance.

Again, the dispute ruling confirms the coverage of a mandatory labeling requirement over some non-product-related requirements but provides little, if not any, clues to the scope of voluntary labeling requirement. Nevertheless, the AB’s interpretation for the relationship between the first sentence and the second sentence may have a valuable implication. Since the definition of a ‘standard’ contains similarly expressed sentences, it can be inferred likewise that the second sentence in the ‘standard’ definition provides *additional* subject matters to the subject matters provided by the first sentence. This means that voluntary labeling requirements just like mandatory labeling requirements are not subject to the scope established by the first sentence, which, in turn, means labeling requirements can be either product related or non-product related. Therefore, as long as the subject matters in the second sentence such as labeling requirements for example are concerned, the scope of mandatory labeling requirements and that of voluntary labeling requirements may be identical.

In conclusion, it is still uncertain whether the scope of ‘standards’ covers non-product related PPMs or not. However, interpretation in a recent dispute implies that all those voluntary standards exemplified in the second sentence of its definition, namely, terminologies, symbols, packaging, marking or labelling requirements may cover both product-related and non-product related PPMs.

3.2.4 A legal element of “for common and frequent use”

The legal element of “for common and frequent use” requires a standard to acquire the characteristic of general applicability of the rules, guidelines or characteristics of products or related PPM. Thus, in *US-Tuna II*, the Panel stated that “[t]his in turn has a bearing on the

frequency of the use of such rules, guidelines or characteristics”.⁷³ Nevertheless, it remains ambiguous what degree of frequency or generality would satisfy this element.

This legal element is probably useful for distinguishing, for the purpose of the Agreement, ‘standards’ and non-‘standards’ from the perspective of their use. If a certain technical specification is normally used for some occasions but not sufficiently “for common and frequent use” within the meaning of the TBT Agreement, then the specification cannot be considered a ‘standard’ in this regime. This threshold criterion can be a dispute issue if a voluntary technical specification is widely used, but probably not widely and frequently enough in order to be perceived as a ‘standard’ from an eye of a Member.

3.2.5 A legal element of “approval by a recognized body”

The definition of ‘standard’ requires that a ‘standard’ be a document “approved by a recognized body”.⁷⁴ The legal element is composed of two parts: a *recognized* body and *approval* by the body. The TBT Agreement does not expressly explain the meanings of these two parts. In disputes, they are examined during the analysis in respect of Article 2.4 of the TBT Agreement, which basically requires a ‘technical regulation’ to be based on “a relevant international standard”.

In *EC-Sardines*, the issue related to this legal element was surrounding the term “approval”. The disputants disagreed whether approval should take place by consensus or by other methods. The Panel and the AB noted the last two sentences of the explanatory note to the definition of ‘standard’ in Annex 1.2, which states, “Standards prepared by the international standardization community are based on consensus. This Agreement covers also documents that are not based on consensus”. The Panel interpreted these sentences as in the following, which the AB endorsed,

“The first sentence reiterates the norm of the international standardization community that standards are prepared on the basis of consensus. The

⁷³ Panel report, *US-Tuna II*, para. 7.674.

⁷⁴ TBT Agreement, Annex 1.2.

following sentence, however, acknowledges that consensus may not always be achieved and that international standards that were not adopted by consensus are within the scope of the TBT Agreement.[footnote 86 omitted] This provision therefore confirms that even if not adopted by consensus, an international standard can constitute a relevant international standard.”

Therefore, the *approval* by a recognized body is interpreted to mean not only consensus but also some other means.

The term “a recognized body” in the context of the analysis under Article 2.4 was interpreted in *US-Tuna II* based on the ISO/IEC 2 Guide which defines “body” as a “legal or administrative entity that has specific tasks and composition”.⁷⁵ Regarding the term, the AB noted that the definition refers to a “body”, not an “organization” and, likewise, Annex 1.4 defines an “international body or system”, not an “international organization”. Based on the term “body”, the AB clarified that, for the purpose of the TBT Agreement, “international” standards are adopted by “bodies”, which may be, but not always have to be, “organizations”.⁷⁶

Then, the AB takes a textual approach in interpreting the term “activities”. It stated,

“... the ISO/IEC Guide 2:1991 defines a “body” as a “legal or administrative entity that has specific tasks and composition”. With respect to the specific tasks, the definition specifies that an international standardizing body must have “activities in standardization”. “Activity” is defined in the dictionary as the “state of being active”. The term “activity” thus may refer to an instance of action, as well as a state. As a result, the use of the plural “activities” does not necessarily imply that a body is, or has been, involved in the development of more than one standard. As we see it, a body simply has to be “active” in standardization in order to have “activities in standardization”.⁷⁷

⁷⁵ Panel report, *US-Tuna II*, para. 7.679.

⁷⁶ AB report, *US-Tuna II*, para. 355.

⁷⁷ AB report, *US-Tuna II*, para. 360.

Thus, according to the AB, a *body* must have specific tasks such as standardization, but the activity can involve just one standard or many and a body should be *active* in standardization.

Regarding the term “recognized”, the Panel in *US-Tuna II* considered it as referring to the body’s activities in standards development, and inferred such recognition from the participation of the countries that are parties to the AIDCP, a relevant international agreement, in those activities and from the resulting standard.⁷⁸ The AB, finding that the definition of “standardizing body” in the ISO/IEC Guide 2:1991 does not conflict with the definition of the TBT Agreement, confirmed that the definition of the former “adds to and complement” the latter, specifying that “a body must be “recognized” with respect to its “activities in standardization”.

The AB explained that the term *recognition* should be considered not only in factual dimension but in normative dimension as well. It found, “[t]he term “recognize” is defined as “[a]cknowledge the existence, legality, or validity of, [especially] by formal approval or sanction; accord notice or attention to; treat as worthy of consideration””.⁷⁹ Then, it explained that “these definitions fall along a spectrum that ranges from a factual end (acknowledgement of the existence of something) to a normative end (acknowledgement of the validity or legality of something). In interpreting “recognized activities in standardization”, we will therefore bear in mind both the factual and the normative dimension of the concept of “recognition”.”⁸⁰

Accordingly, the AB summarized that a “standardizing body” means a body with “recognized activities in standardization” but it does not need to have standardization as “its principal function, or even a one of its principal function” and, at the same time, requires, at a minimum, that WTO Members must be aware, or have reason to expect, that the international body in question is engaged in standardization activities.

By implication, how far in the extent the AB’s interpretation and analysis can be applied to a general concept of ‘standards’, rather than ‘international standard’ within the meaning of Article 2.4 is not certain yet. Nevertheless, the examination method for other levels of standards such as regional standards, central or local government standards, or private

⁷⁸ Panel report, *US-Tuna II*, para. 7.686.

⁷⁹ AB report, *US-Tuna II*, para. 361.

⁸⁰ AB report, *US-Tuna II*, para. 361.

standards will be very similar to the summarized analysis for international standards elaborately described above.

Last, the TBT Agreement's 'standard' and 'technical regulation' are based on slightly different concept of *standards bodies*. In general, the concept of "a recognized body" in the definition of 'standard' seems to be encompassing a broad range of bodies since the element covers all different levels of bodies – international, regional, central government, local government or private. In contrast, standards bodies for 'technical regulation' are not explicitly mentioned in its definition but they are implied in the regulatory structure of the TBT Agreement and limited to central, local or non-government bodies within the boundary of a state's territory.

3.2.6 A legal element of “voluntary compliance”

The legal element of “voluntary compliance” is a determinative factor for distinguishing 'standard' from 'technical regulation' within the meanings of the TBT Agreement and for the purpose of the TBT Agreement. The exact expression in the definition of 'standard' is “document...with which compliance is not mandatory” which largely corresponds but contrasts with the phrase “document with which compliance is mandatory” in the definition of 'technical regulation'. Therefore, the meaning of “mandatory” compliance is a critical legal element for delineating the scope of 'standard' as opposed to the scope of 'technical regulation'.

This legal element has been the most important feature for drawing a dividing line between 'standard' and 'technical regulation'. This approach, i.e. an approach to divide the two categories based on the compliance character, is typical to the TBT Agreement. Few standards bodies define “standard” in terms of its voluntary compliance.

For the purpose of this study, the analysis in Chapter 5 is devoted to closely reviewing and examining panels' and the AB's interpretation and application of the concept “mandatory” compliance represented in disputes to date. Therefore, the content of this section will further discussed in Chapter 5.

3.3 ‘Standards’ Disciplines of the WTO TBT Agreement

3.2.1 Regulatory structure of the TBT Agreement

The scope of this study is limited to ‘technical regulations’ and ‘standards’ since the ultimate purpose is to delineate the regulatory boundaries and scope of ‘standards’ in relation with those of ‘technical regulations’. The subsequent analyses in this thesis will be based on a two-by-three matrix box as shown in <Figure 3>, in which two subject matters, i.e. technical regulations and standards will be put horizontally while three entities, i.e. central, local and non-governmental bodies will be laid out vertically. This analytic box is a part of the original matrix shown in <Figure 1> and only the first two columns are carved out from the original matrix in order to show regulatory scopes for ‘standards’ and their relations with ‘technical regulations’.

Figure 3. Regulatory scope of the WTO TBT Agreement

	Technical regulations	Standards
Central government bodies	Article 2 Preparation, adoption and application of technical regulations by central government bodies	Article 4 Preparation, adoption and application of standards
Local government bodies	Article 3 Preparation, adoption and application of technical regulations by local government bodies and non-government bodies	
Non-government bodies		

Source: Author’s analysis

<Figure 3> shows that different Articles are applied to ‘technical regulation’ and to ‘standard’. Article 2 and 3 are applied to ‘technical regulations’ and Article 4 is applied to ‘standard’. However, this regulatory scope is further divided in accordance with different levels of standards bodies. Therefore, Article 2 governs matters related to technical regulations of central government bodies while Article 3 regulates matters related to technical regulations of local and non-government bodies. However, this division is only what is apparent from the legal text. If we consider the provisions and contents of each Article, the regulatory scope can be even further divided by different degrees of the implementation obligations.

To begin with, TBT Agreement’s regulatory structure shows that the Agreement imposes different levels of implementation obligation to different levels of standards bodies. Regardless of the legal characterization of a measure, the Agreement imposes the highest level or the strongest implementation obligation on central government standards bodies. In specific, Article 2 which disciplines ‘technical regulation’ of central government bodies requires that the Members “shall ensure” those bodies to comply with the rules and procedures set out in the provision. Also, Article 4 which governs ‘standard’ of central government bodies demands the Members “shall ensure” such bodies to accept and comply with the Code of Good Practice. Thus, the expression “shall” appears in provisions applied to central government bodies, and thus the obligations imposed on Members with respect to central government bodies’ activities are very strong.

Then, the implementation obligation for central government bodies is compared with corresponding obligations for standards bodies of other levels. An analysis shows that, for local government bodies and non-government bodies, the obligation is only ‘best effort’ requirement. In specific, Article 3 requires that the Members “shall take such reasonable measures as may be available to ... ensure” local government bodies’ compliance with the provisions of Article 2. Also, Article 4 demands that the Members “shall take such reasonable measures as may be available to them to ensure” that non-government bodies accept and comply with the Code of Good Practice. Thus, for local and non-governmental standards bodies, implementation obligation is expressed in ambiguous phrases as “shall take such reasonable measures as may be available to ensure” and it can be inferred that, due to this ambiguity, the actual reach of the Agreement’s discipline will be very limited.

Therefore, in practice, it turns out that Article 2 is devoted to regulate technical regulations of central government bodies, and Article 4 and Code of Good Practice can only effectively govern standards by central government bodies. The summary of discussion is illustrated in <Figure 4> which clearly shows that central government bodies' technical regulations and standards are practically and effectively subject to implementation of the Agreement. In contrast, local government bodies' and non-governmental bodies' technical regulations and standards are subject to only "best effort" requirements for implementation, which means that the operation of the Agreement is not practically effective on them.

Figure 4. Different degrees of obligation in the WTO TBT Agreement

	Mandatory technical regulation	Voluntary standards
Central government bodies	Article 2 (<i>"...shall ensure..."</i>)	Article 4 (<i>"...shall ensure ... accept and comply with the Code of Good Practice..."</i>)
Local government bodies	Article 3 (<i>"...shall take such reasonable measures as may be available to ... ensure compliance ... with the provisions of Article 2, with the exception... to notify..."</i>)	Article 4 (<i>"...shall take such reasonable measures as may be available to them to ensure...accept and comply with the Code of Good Practice..."</i>)
Non-government bodies		

Source: Author's analysis

The adoption of a regulatory structure based on different levels of standards bodies was inevitable since different countries have different standards systems. In some countries, the domestic standardization and standards system is centralized so that central government

bodies play leading, if not dominant, roles in standard-setting. In other countries, however, the domestic political system is based on a fragmented structure in which local-government or state-government bodies can independently enact technical regulations and establish standards. In these two cases, the government, regardless of central or local, is at the center of standardization activity but the actual reach and effectiveness of the WTO Agreements including the TBT Agreement will be limited to activities of central government bodies; the operation of the WTO Agreements will only indirectly affect local government bodies through the influence by central government bodies.

There is a more challenging situation in which standardization primarily belongs to the domain of private work and non-government bodies are the major actors in supplying standards. In such a case, government only adopts useful private standards as basis for its government technical regulations and standards. Although the TBT Agreement contains this category, i.e. technical regulations and standards by non-governmental bodies, as part of its subject matters and entities, if the Agreement imposes the same obligations under the equivalent degree of implementation pressure on non-government bodies through central government bodies, it would be highly questionable whether such obligations can effectively implemented and whether a Member with this type of domestic standardization structure is under substantially heavier implementation burden than a Member with a centralized system.

In fact, different situations in different countries were virtually one of the most challenging and important issues throughout the negotiation history of the TBT Agreement. Particularly, the early drafters have perceived the Agreement's critical regulatory problem surrounding imbalance in burdens of the TBT Agreement implementation. At first, they considered that the early GATT system was primarily a legal regime for governments, so Agreements would be applied only to the Members or central governments in principle. The essential problem was that unless obligations for local government bodies and non-government bodies were explicitly addressed, de-centralized countries would enjoy less implementation burden while only centralized countries would be practically subject to the draft TBT regime.

On this background, the early TBT Agreement drafters decided to include specific rules and procedures for local and non-government standards bodies in the legal text. To address the imbalance and regulatory fragility problem, the drafting negotiators decided to incorporate obligations for local and non-government bodies on the one hand and to apply a different

degree of implementation obligation to each level of standards bodies on the other hand. In addition, the TBT Agreement requires the Members to be responsible for and allows other Member's dispute challenges regarding any matters accruing to the operation of the TBT Agreement

Even so, practical difficulties still remained. Even if legally and conceptually equal weight of burden was put on Members through provisions of Articles 3 and 4 and even if both decentralized standards systems and centralized standards systems were, in principle, subject to the same disciplines of the TBT Agreement, the experience under the GATT Standards Code proved that it was very difficult to bring activities of non-government bodies into the realm of the TBT regime. An attempt to improve this regulatory deficiency was the adoption of the Code of Good Practice. However, it is still doubtful that the current TBT Agreement can ever virtually and effectively reach standards activities carried out by non-government bodies.

3.2.2 Common disciplines for 'standard' and 'technical regulation'

General principles and rules governing central government bodies' technical regulations and standards are almost identical. When the two sets of provisions, i.e., those in Article 2, which governs matters related to central government bodies' preparation, adoption and application of technical regulations and those in the Code of Good Practice, which is applied to regulate central government standardizing bodies' preparation, adoption and application of standards, are compared in terms of their disciplines, they basically stipulate the same general principles and rules. As shown in <Table 2>, the two sets of provisions not only commonly provide the GATT's fundamental principles such as non-discrimination, removal of unnecessary obstacles, and some transparency procedures, but they also identically require central government bodies to use international standards, participate in international standardization, and prefer performance-based standards.

To elaborate, Paragraph D of the Code provides standardizing body's obligations of most-favored-nation treatment and national treatment in respect of standards while the same non-discrimination rule is applied to central government body's technical regulations in accordance with Article 2.1. Paragraph E requires standardizing body to ensure that

standards are not prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade, the same obligation in exactly identical language of which is also found in the first sentence in Article 2.2.

Table 2. Common disciplines for technical regulations and standards in the WTO TBT Agreement

Disciplines (Rules and obligations)	Disciplines for Technical Regulations provided in the comparable provisions of Article 2	Disciplines for Standards provided in the comparable provisions of the Code of Good Practice
Non-discrimination	2.1	D
Not with a view to or with effect of creating unnecessary obstacles to international trade	2.2	E
Use of International standards as a basis	2.4	F
Participation in international standardization	2.6	G
Based on performance rather than design or descriptive characteristics	2.8	I
Transparency Rules (prompt publication, provision of copies upon request, reasonable intervals for comments, comment-and-reply rules)	2.9, 2.10, 2.11, 2.12	J, K, L, M, N, O, P, Q

Source: Author's analysis

In addition, Paragraph F requires standardizing body to use international standards as a basis for the standards it develops, except where such international standards would be ineffective or inappropriate, for instance, because of an insufficient level of protection or fundamental climatic or geographical factors or fundamental technological problems. This obligation to use international standards as a basis is also provided in Article 2.4 in respect of central government body's technical regulations.

In line with its recognition of important contribution by international standards and its encouragement for the development of international standards in preamble, the TBT Agreement obligates Members to participate as fully as possible in the preparation of international standards. Thus, paragraph G provides that, with a view to harmonizing

standards on as wide a basis as possible, the standardizing body shall, in an appropriate way, play a full part, within the limits of its resources, in the preparation by relevant international standardizing bodies of international standards regarding subject matter for which it either has adopted, or expects to adopt, standards. Likewise, Article 2.6 stipulates that Members shall play a full part, within the limits of their resources, in the preparation by appropriate international standardizing bodies of international standards for products which they either have adopted, or expect to adopt, technical regulations.

Whenever appropriate, both standards and technical regulations should be based on product requirements in terms of performance rather than design or descriptive characteristics, according to paragraph I of the Code and Article 2.8 of the Agreement, respectively.

Despite some differences in detail, transparency rules for standards and technical regulations generally resemble to each other. Once standards or technical regulations are adopted, they should be promptly published in accordance with paragraph O and Article 2.11, respectively. Central government bodies shall, upon request, promptly and without discrimination provide or arrange to provide copies of their standards or technical regulations as paragraph P and Article 2.9.2.

Both the Code and Article 2 adopt a comment-and-reply mechanism to enhance the transparency and international harmonization during standardization process. Paragraphs L through N stipulates that the standardizing body should allow a period of at least 60 days for the submission of comments on draft standards, provide a copy of a draft standard for such comments, reply as promptly as possible to comments submitted and take them into account in the further procession of the standard. All these procedures are also found in Article 2.9 and applied to preparation and adoption of technical regulations whenever a relevant international standard does not exist or the technical content of a proposed technical regulation is not in accordance with that of relevant international standards and if the technical regulation may have a significant effect on trade.

3.2.3 Different disciplines for ‘standard’ and ‘technical regulation’

Although general principles and rules governing central government bodies' technical regulations and standards are significantly similar, factors that are considered important and, thus, stipulated in more detail in each of the Code of Good Practice and Article 2 are different and noteworthy. Throughout the provisions in the TBT Agreement, disciplines for technical regulations adopted and applied by central government bodies have fundamental goals of preventing protectionist measures in disguise and, therefore, they elaborate on criteria for legitimate objectives and justifications of technical regulations proposed or already adopted. On the contrary, no such qualifications are imposed by the Code on preparation, adoption and application of standards.

Another different discipline is related to harmonization rules: with respect to technical regulations, Article 2 encourages central government bodies to recognize equivalence whereas, the Code asks standardizing bodies to harmonize domestically as well as regionally and internationally and expects them to avoid duplications and overlaps.

In addition, technical regulations are to be notified to the WTO Secretariat while standards are notified to the ISO/IEC Information Centre, which may represent different fora and, thus, different purposes for information dissemination.

3.2.3.1 No explicit requirement of “legitimate objectives” for standards

The fifth and sixth recitals in the preamble of the TBT Agreement attempts to balance Member's regulatory autonomy on one hand and trade liberalization on the other. According to the fifth recital, all types of technical barriers, namely, technical regulations and standards, including packaging, marking and labeling requirements and procedures for assessment of conformity with technical regulations and standards, should not create unnecessary obstacles to international trade. The sixth recital basically recognizes countries' taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate. In principle, therefore, Member countries' preparation, adoption and application of technical regulations or standards are allowed and unregulated. However, it pursues coordination and a kind of balance between objectives of measures and

trade-restrictive effects of them, conditioning that Members' measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade.

In line with the objectives stated in the preamble, paragraph E of the Code provides that the standardizing body shall ensure that standards are not prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade. However, the paragraph does not specify the stated general rule nor explains what it means or how to review it when a dispute arises with respect to this least-trade-restrictive principle.

On the contrary, disciplines for technical regulations adopted and applied by central government bodies are more specific and clearer. The second sentence in Article 2.2 further stipulates that necessity is judged by the legitimacy of the technical regulation under concern and lays out indicative list of what constitutes 'legitimate purposes.' It reads, "[f]or this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective, taking account of the risks non-fulfillment would create. Such legitimate objectives are, *inter alia*: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, *inter alia*: available scientific and technical information, related processing technology or intended end-uses of products."

Thus, disciplines for technical regulations require sound grounds and justification for their adoption in the first place and demand for continued justification for technical regulations. In specific, Article 2.3 explicitly provides that technical regulations shall not be maintained if the circumstances or objectives giving rise to their adoption no longer exist or if the changed circumstances or objectives can be addressed in a less trade-restrictive manner. Furthermore, Article 2.5 stipulates, "[a] Member preparing, adopting or applying a technical regulation which may have a significant effect on trade of other Members shall, upon request of another Member, explain the justification for that technical regulation in terms of the provisions of paragraph 2 to 4. Whenever a technical regulation is prepared, adopted or applied for one of the legitimate objectives explicitly mentioned in paragraph 2, and is in accordance with relevant international standards, it shall be refutably presumed not to create unnecessary obstacles to international trade."

The TBT Agreement suggests an indicative, not exclusive, list of legitimate purposes of

technical regulations. In the sixth recital of its preamble, the Agreement recognizes regulatory autonomy of the Members, in an attempt to balance between Members' sovereign rights to pursue 'legitimate' social goals and the multilateral systems' trade liberalization goal with the critical phrase of 'measures necessary'.⁸¹ Then, it further suggestively lists such standardization purposes as assurance of the product quality, protection of human, animal or plant life or health, protection of environment or prevention of deceptive practices. In jurisprudence, any additional standardization purposes explicitly stated in the provisions of other GATT/WTO Agreements can also be directly based on by technical regulations.

3.2.3.2 Requirements of participation in the preparation of international standards

The third recital of the preamble of the TBT Agreement recognizes the importance of international standards and conformity assessment systems in improving production efficiency and facilitating international trade. Accordingly, paragraph F of the Code and Article 2.4 respectively provides harmonization of standards and technical regulations with relevant international standards when effective and appropriate relevant international standards exist or their completion is imminent. In addition, paragraph G and Article 2.6 promote as wide harmonization of respective standards and technical regulations as possible through encouraging active participation by respective standardizing bodies and the central government bodies in international standardization process.

With respect to technical regulation, Article 2.6 requires Members to play a full part, within the limits of their resources, in the preparation by appropriate international standardizing bodies in international standards for products for which they either have adopted, or expect to adopt, technical regulations.

For standards, in contrast, the Code additionally requires such participation to be carried out 'in an appropriate way'. The second sentence in paragraph G provides that, for standardizing bodies within the territory of a Member, participation in a particular international standardization activity should, whenever possible, take place through one

⁸¹ TBT Agreement, preamble, recital 6.

delegation representing all standardizing bodies in the territory that have adopted, or expect to adopt, standards for the subject matter to which the international standardization activity relates.

3.2.3.3 Requirements of national harmonization and national consensus for standards

Paragraph H of the Code provides that standardizing body within the territory of a Member should make effort to avoid duplication of or overlap with the work of other standardizing bodies in the national territory or with the work of relevant international or regional standardizing bodies. The second sentence of the paragraph goes on to stipulates that standardizing body should also make effort to achieve a national consensus on the standards they develop. Read together, it seems that the Code strongly pursue domestic standards harmonization as well as regional or international standards harmonization.

The Code does not contain rules of recognition of equivalence as an explicit instrument with respect of standards harmonization, which is unlike from disciplines for technical regulations in Article 2.6. The article provides that Members give positive consideration to accepting as equivalent technical regulations of other Members, even if these regulations differ from their own, provided they are satisfied that these regulations adequately fulfill the objectives of their own regulations.

3.2.3.4 Publication of standards in preparation and notification to ISO/IEC Information Center

According to paragraph J, standardizing body should publish a work program at least once every six months. It defines standard preparation a period from the moment of decision to develop a standard until that standard has been adopted. Then, it further stipulates a series of procedural requirements for national publication and notification to ISO/IEC Information Center, as in the following:

“The titles of specific draft standards shall, upon request, be provided in English, French or Spanish. A notice of the existence of the work program shall be published in a national or,

as the case may be, regional publication of standardization activities.

The work program shall for each standard indicate, in accordance with any ISONET rules, the classification relevant to the subject matter, the stage attained in the standard's development, and the references of any international standards taken as a basis. No later than at the time of publication of its work program, the standardizing body shall notify the existence thereof to the ISO/IEC Information Center in Geneva.

The notification shall contain the name and address of the standardizing body, the name and issue of the publication in which the work program is published, the period to which the work program applies, its price (if any), and how and where it can be obtained. The notification may be sent directly to the ISO/IEC Information Center, or, preferably, through the relevant national member or international affiliate of ISONET, as appropriate."

With respect to technical regulation, there is no explicit requirement for national publication and it seems to be left to the discretion of Members' central government bodies. Article 2 only requires Members to ensure prompt publication to other Members or to interested parties in other Members. Also, central government bodies are obliged to notify to the WTO Secretariat of not all but some of technical regulations in proposal or immediately after adoption in case of urgency, whenever technical regulations deviate from relevant international standards and they may have a significant effect on trade of other Members.

Therefore, the purpose of notification and publication requirements with respect to technical regulations would be to make those trade-restrictive technical regulations transparent to other Members or interested parties in other Members and let them be acquainted with them, before they are officially adopted or immediately after they adopted in case of urgency. In contrast, the notification and publication requirements with respect to standards emphasize domestic publication and purpose of domestic harmonization along with regional or international transparency. Also, information sharing is taken charge of by ISO/IEC Information Center, not by any WTO body and the notification requirement is not conditioned with any deviation from relevant international standards and possibility of significant trade restriction.

3.2.3.5 Positive approach for technical regulations vs. negative approach for standards

With respect to preparation, adoption and application of technical regulations, Members shall not take measures which require or encourage local government bodies or non-governmental bodies within their territories to act in a manner inconsistent with the provisions of Article 2 (Article 3.4). In addition, Members are fully responsible for the observance of all provisions of Article 2 and Members shall formulate and implement positive measures and mechanisms in support of the observance of the provisions of Article 2 by other than central government bodies (Article 3.5).

With respect to preparation, adoption and application of standards, Members are similarly required to take a full responsibility. According to the third sentence of Article 4.1, Members are prohibited take measures which have the effect of, directly or indirectly, requiring or encouraging such standardizing bodies to act in a manner inconsistent with the Code of Good Practice. Furthermore, the last sentence of Article 4.1 stipulates that the obligations of Members with respect to compliance of standardizing bodies with the provisions of the Code of Good Practice shall apply irrespective of whether or not a standardizing body has accepted the Code of Good Practice.

Therefore, it is noted that for Members' obligation to ensure local and non-governmental bodies' compliance with Article 2 with respect to technical regulations is based on a positive approach, meaning that Members are required to take some actions in support of the implementation of Article 2. On the contrary, Members' obligation to ensure compliance of standardizing bodies within their territory with the provisions of the Code takes a negative approach, requiring Members not to take any measures that have the direct or indirect effect of making their standardizing bodies to act inconsistently with the Code.

3.4 Chapter Summary and Partial Conclusion

The fundamental purpose of the TBT Agreement is to reduce and prevent technical barriers to trade. In other words, the Agreement establishes a regime which prevents and deals with

trade-restrictive effect of standards rather than directly controlling standards and standardization activities. Chapter 3, therefore, is devoted to reviewing the current TBT regime that defines ‘standard’ as one of its subject matters and regulates it through disciplines set out in provisions of Article 3 and the Code of Good Practice in Annex 4. In particular, it examines major legal elements that comprise the concept of ‘standards’ for the purpose of the TBT Agreement and adopts a comparative analysis with a view to highlight both common and different features in the Agreement’s treatments toward ‘standards’ and ‘technical regulations’.

The major findings of the analysis on the meaning of ‘standards’ in the current TBT Agreement include that products must be identifiable in documents of ‘standards’, that it is not still clear as to whether the scope of ‘standards’ covers non-product related PPMs or not, but voluntary labelling, for example, may cover both product-related and non-product related PPMs, and that approval by a recognized ‘standards’ bodies can be perceived from broad perspectives. The concept of ‘standards’ shares many commonalities with the concept of ‘technical regulations’ except for its legal element of “voluntary” compliance.

The comparison of the disciplines concludes that the Agreement’s obligations for ‘standards’ and ‘technical regulations’ are largely identical. Nevertheless, in addition to transparency procedures, there are a few critical differences in disciplines for ‘standard’ such as the Agreement’s no explicit requirement for “legitimate objectives”, expressive requirement for national harmonization and pursuit of national consensus, and requirement for Member’s implementation effort based on a negative approach. Above all, the disciplines for ‘standards’ provided in Annex 4 Code are applied, in principle, only conditionally upon the acceptance by standards bodies.

In sum, there is dominant evidence showing that the concept of ‘standards’ largely resembles the concept of ‘technical regulations’ particularly in terms of its definition and its disciplines in the TBT Agreement. However, a few legal elements critically differentiate the two concepts. In particular, it is noted that the legal element of “mandatory/voluntary compliance” is a key factor for the distinction, and voluntary ‘standards’ are subject to a relatively general and indirect TBT disciplines when compared to mandatory ‘technical regulations’.

Table 3. Different disciplines for technical regulations and standards in the WTO TBT Agreement

Disciplines (Rules and obligations)	Disciplines for Technical Regulations provided in the comparable provisions of Article 2	Disciplines for Standards provided in the comparable provisions of the Code of Good Practice
<p>Unnecessary obstacles to international trade</p> <ul style="list-style-type: none"> - legitimated objectives - risk assessment 	<p>2. Members shall ensure that technical regulations are not prepared adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. <u>For the purpose, technical regulations shall not be more trade-restrictive than necessary to fulfill a legitimated objective, taking account of the risks non-fulfillment would create. Such legitimate objectives are, inter alia: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, of the environment. In assessing such risks, relevant elements of consideration are, inter alia: available scientific and technical information, related processing technology or intended end-uses of products.</u></p>	<p>D. The standardizing body shall ensure that standards are not prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade.</p>
<p>Paly a full part in the preparation of international standards</p>	<p>6. With a view to harmonizing technical regulations on as wide a basis as possible, Members shall paly a full part, within the limits of their resources, in the preparation by <u>appropriate</u> international standardizing bodies of international standards <u>for products</u> for which they either have adopted, or expect to adopt, technical regulations.</p>	<p>G. With a view to harmonizing standards on as wide a basis as possible, the standardizing body shall, <u>in an appropriate way</u>, play a full part, within the limits of its resources, in the preparation by <u>relevant</u> international standardizing bodies of international standards <u>regarding subject matter</u> for which it either has adopted, or expect to adopt, standards. <u>For standardizing bodies within the territory of a Member, participation in a particular international standardization activity shall, whenever possible, take place through one delegation representing all standardizing bodies in the territory that have adopted, or expect to adopt, standards for the subject matter to</u></p>

		<u>which the international standardization activity relates.</u>
Equivalence recognition	7. Members shall give positive consideration to accepting as equivalent technical regulations of other Members, even if these regulations differ from their own, provided they are satisfied that these regulations adequately fulfil the objectives of their own regulations. (No comparable provision)	(No comparable provision)
Domestic harmonization/ regional, international harmonization		H. The standardizing body within the territory of a Member shall make every effort to avoid duplication of, or overlap with, the work of other standardizing bodies in the national territory or with the work of relevant international or regional standardizing bodies. They shall also make every effort to achieve a national consensus on the standards they develop. Likewise the regional standardizing body shall make every effort to avoid duplication of, or overlap with, the work of relevant international standardizing bodies.
Transparency procedures	9. Whenever a relevant international standard does not exist or the technical content of a proposed technical regulation is not in accordance with the technical content of relevant international standards, and if the technical regulation may have a significant effect on trade of other Members, Members shall: 9.1 publish a notice in a publication at an early appropriate stage, in such a manner as to enable interested parties in other Members to become acquainted with it, that they propose to introduce a particular technical regulations; 9.2 notify other Members through the Secretariat of the products to be covered by the proposed technical	J. At least once every six months, the standardizing body shall publish a work programme containing its name and address, the standards it is currently preparing and the standards which it has adopted in the preceding period.... A notice of the existence of the work programme shall be published in a national or, as the case may be, regional publication of standardization activities.....The notification may be sent directly to the ISO/IEC Information Centre, or preferably through the relevant national member or international affiliate of ISONET, as appropriate. L. Before adopting a standard, the standardizing body shall allow a period of at least 60 days for the submission of comments on the draft standard by interested parties within the territory of a Member of the WTO.

	<p>regulation, together with a brief indication of its objective and rationale. Such notifications shall take place at an early appropriate stage, when amendments can still be introduced and comments taken into account;</p> <p>9.3 upon request, provide to other Members particulars or copies of the proposed technical regulation and, whenever possible, identify the parts which in substance deviate from relevant international standards;</p> <p>9.4 without discrimination, allow reasonable time for other Members to make comments in writing, discuss these comments upon request, and take these written comments and the results of these discussions into account.</p>	<p>This period may, however, be shortened in cases where urgent problems of safety, health or environment arise or threaten to arise. No later than at the start of the comment period, the standardizing body shall publish a notice announcing the period for commenting in the publication referred to in paragraph J. Such notification shall include, as far as practicable, whether the draft standard deviates from relevant international standards.</p> <p>M. On the request of any interested party within the territory of a Member of the WTO, the standardizing body shall promptly provide, or arrange to provide, a copy of a draft standard which it has submitted for comments. Any fees charged for this service shall, apart from the real cost of delivery, be the same for foreign and domestic parties.</p> <p>N. The standardizing body shall take into account, in the further processing of the standard, the comments received during the period for commenting. Comments received through standardizing bodies that have accepted this Code of Good Practice shall, if so requested, be replied to as promptly as possible. The reply shall include an explanation why a deviation from relevant international standards is necessary.</p>
	Article 3	Article 4
Member's responsibility for the compliance by local and non-government bodies	4. Members shall not take measures which require or encourage local government bodies or non-governmental bodies within their territories to act in a manner inconsistent with the provisions of Article 2.	1. Members shall ensure that their central government standardizing bodies accept and comply... They shall take such reasonable measures as may be available to them to ensure that... In addition, Members shall not take measures which have the effect of, directly or indirectly, requiring or encouraging such standardizing bodies

	<p>5. Members are fully responsible under this Agreement for the observance of all provisions of Article 2. <u>Members shall formulate and implement positive measures and mechanisms in support of the observance of the provisions of Article 2 by other than central government bodies.</u></p>	<p>to act in a manner inconsistent with the Code of Good Practice... The obligations of members with respect to compliance of standardizing bodies with the provisions of the Code of Good Practice shall apply irrespective of whether or not a standardizing body has accepted the Code of Good Practice.</p>
--	--	---

* Distinctive and noteworthy phrases are underlined.

Chapter 4. Conceptual Development of “Standard” in the GATT/WTO system

4.1 Chapter Overview

The GATT/WTO system has long attempted to establish an effective regime to reduce and prevent technical barriers and, after a series of negotiations and revisions, it finally adopted the definitions, regulatory structures and disciplines currently provided in the TBT Agreement. Multilateral negotiations to regulate trade-restrictive standards began right after the Kennedy Round as the negotiators felt a need to discipline non-tariff barriers. The negotiation for standards was generally successful and proceeded with little difficulties compared to other non-tariff barrier issues during the Tokyo Round negotiation.

Nevertheless, there have been substantial changes with respect to definitions, regulatory structures, and disciplines from the initial design to the GATT TBT Agreement and to the WTO TBT Agreement and the concept of “standard” has experienced several revisions. In consequence, the concept of “standards” defined and regulated by the WTO TBT Agreement now is a result of the long process of negotiations and revisions and, therefore, it should be understood and interpreted based on this developmental context.

On the reasoning, this thesis considers it appropriate and essential to examine the concept of “standard” designed by early negotiators, negotiated during the Tokyo Round, and revised during the Uruguay Round in order to grasp a full meaning of ‘standard’. Accordingly, this chapter focuses on the conceptual development of “standard” throughout the negotiations of the GATT/WTO system and analyses the concepts of “standard” appearing in draft and final texts of the TBT Agreement.

This chapter begins with a review on initial discussions on non-tariff barriers and efforts to identify the problems of “standards” right after the Kennedy Round and in the preparatory stage of the Tokyo Round. Then, it continues to study major standards issues during the Tokyo Round, highlighting the harmonization process of the GATT TBT draft codes with the ISO/ECE definitions. This chapter also compares terminologies, definitions, and regulatory scopes of “standards” found in the earliest available draft text with those in the 1978 draft and with those in the final Standards Code in order to show a general direction of the negotiations and revisions regarding the concept of “standard”. Finally, this chapter addresses issues negotiated during the Uruguay Round and elaborates on major issues of the Agreement’s coverage, particularly over PPMs, and the issue of inserting the Code of Good Practice in Annex 4 to the WTO TBT Agreement.

4.2 “Standard” after the Kennedy Round Negotiations

4.2.1 Rising issues of nontariff barriers after the Kennedy Round negotiations

Over the first two decades of the GATT negotiating history, the Contracting Parties witnessed a series of successful tariff reductions. The past achievements and positive experience had helped negotiators gain confidence in the sustainability and operability of the GATT system and the Contracting Parties agreed to significant tariff concessions by taking a linear approach to tariff negotiations during the Kennedy Round. The comprehensive results of tariff negotiation were generally understood to mean a period of some years for full implementation and were perceived to bring about massive trade impact and industrial adjustments in the following several years. Therefore, although a need to negotiate non-tariff barriers was affirmed, the general sentiment at the conclusion of the Kennedy Round, was that there would be little chance for any major initiatives for subsequent negotiations

dealing with whole range of tariffs and non-tariff issues in any near future.⁸²

Nevertheless, the Contracting Parties recognized increasingly serious problems of non-tariff trade barriers and rising need to address them in order to fully realize benefits of the tariff eliminations. Thus, it was almost inevitable for the Contracting Parties to begin preparation and discussion for non-tariff barrier negotiations right after the conclusion of the Kennedy Round Negotiation. In the twenty-fourth session of the GATT in November 1967, which was the first meeting after the Kennedy Round, the Director-General stated that there should continue discussion on what the non-tariff barriers are and how to deal with them. In specific, the Director-General called for building up inventories of non-tariff measures which the Contracting Parties considered to constitute non-tariff barriers to trade in industrial products.⁸³

However, the problem of non-tariff barriers was, in their nature, diverse, complex and technical. Each Contracting Party seemed to understand non-tariff barriers differently, and there was need to study their characteristics, ways to handle them and alternatives in decision-makings.⁸⁴ As a result, during the preparatory stage prior to the Tokyo Round negotiation,

⁸² L/2943, paras. 4-9. After the conclusion of the Kennedy Round, the Contracting Parties had the twenty-fourth session in 9-24 November 1967, reviewing their work of the previous twenty years and reaching certain conclusions on their future work programme. In assessing the past achievement, the Contracting parties particularly stressed the progress to attain the objectives of the GATT in expanding world trade and promoting international cooperation in the trade field generally, noted the significant progress made in the field of agricultural trade despite substantial remaining issues, and recognized the pioneering work in the field of the trade problems of the developing countries. In reminding the future works, they agreed that an essential first task was to secure the full implementation of all the results of the Kennedy Round. In addition, although they reaffirmed that 'no new major initiatives for a multilateral and comprehensive move forward could reasonably be expected in the near future,' they recognized that 'it was important to proceed to prepare for further advances.'

⁸³ L/2893, para. 6. The Contracting Party evaluated the past achievement and suggested a future plan, stating, "[t]he results obtained in the trade negotiations on non-tariff barriers to trade in industrial products were relatively modest when compared with the results obtained in the tariff field. This is, however, an area of great concern to both governments and to exporters and an area which may grow in importance as the tariff reductions agreed in the Kennedy Round are implemented. An examination of non-tariff barriers would certainly form part of the work of the working parties just proposed for individual sectors. [The Director-General] suggest[s] also that a decision should now be taken inviting governments to submit lists of non-tariff barriers which, after consultation with their exporters, they believe have an adverse effect on their export trade. This should enable [the Contracting Parties], as a first step, to draw up a complete inventory of non-tariff measures which are considered to constitute barriers to trade in industrial products. An assessment should then be made as to which of these barriers might be susceptible to international negotiation."

⁸⁴ Winham (1986), p.88. Negotiating nontariff measures was very difficult from the beginning since they were "largely undefinable, numerous, often concealed, and incomparable, and that their effects were unknown precisely but generally thought to be pernicious. Negotiators had to achieve an intellectual understanding of these measures before they could negotiate their removal."

enormous efforts and works were followed, particularly for building inventories in order to grasp an entire picture of non-tariff barriers.⁸⁵

4.2.2 Efforts to identify the problems of standards

4.2.2.1 Identifying the problems of nontariff barriers

The Committee on Trade in Industrial Products was created based on some initial thirty three members to work within the terms of reference “to explore the opportunities for making progress toward further liberalization of trade taking into account the discussion on the subject at the twenty-fourth session.”⁸⁶ The Committee had also been given two specific tasks by the Contracting Parties. The first was to carry out an objective analysis of the tariff situation, whether all Kennedy Round concessions have been fully implemented.⁸⁷ The second task was to draw up and analyze an inventory of non-tariff and para-tariff barriers.⁸⁸ At the first meeting of Committee on 17 and 18 October 1968, the Contracting Parties instructed to draw up a report to the Council “to establish appropriate machinery to deal with the problems identified in the inventory”.⁸⁹ Most members agreed to the importance of thorough and careful preparation in the complex field and extensive nature of non-tariff barriers.⁹⁰ However, they recognized difficulties in addressing non-tariff barriers due to their diversity, working uncertainty, and, in some occasions, basis of administrative

⁸⁵ L/2943, para. 10. The Contracting Parties agreed to undertake Programme for Expansion of International Trade under the three main headings: ‘industrial products’, ‘agriculture’ and ‘conclusions relating to the trade of developing countries’. Specifically, under the Programme for Industrial Products, they decided to institute a Committee on Trade in Industrial Products with a view to explore the opportunities for making progress toward further liberalization of trade, to make an objective analysis on the tariff situation to accession implementation of the Kennedy Round concessions and to draw up an inventory of non-tariff and para-tariff barriers affecting international trade. For the inventory, Contracting Parties were asked for to notify the Committee of the non-tariff barriers, both governmental and non-governmental, which they wish to be included in the inventory, which would later be transmitted to the Council for analysis and identification of the problems.

⁸⁶ COM.IND/1.

⁸⁷ The analysis of tariffs, later known as the ‘Tariff Study’ had been circulated by the secretariat under the GATT document series numbered with ‘COM.IND/5/number’.

⁸⁸ The inventory of non-tariff barriers was continuously piled up and reported as addenda or corrigenda to the GATT under the document series numbered with ‘COM.IND/4/number’.

⁸⁹ GATT, L/3083, para. 3.

⁹⁰ GATT, L/3083, para. 4.

discretion.⁹¹ Moreover, the procedure that exporting countries notify trade barriers in importing countries almost amounted to adversely challenging importing Member's national policy, which was 'a political act'.⁹²

In particular, it was difficult to apply a common approach to all different non-tariff barriers. Some barriers were more suitable for some rules of conduct for general acceptance whilst others could be dealt with in a kind of multilateral bargaining.⁹³ Therefore, the Contracting Parties had to consider possibilities of different approaches from case to case. Another specific difficulty lied in the magnitude of works the Contracting Parties had to carry out. The Contracting Parties found the work of inventory-building immense and technical, and, therefore, they decided to simplify the work with some groupings and a barrier-by-barrier approach.⁹⁴

As a result, all the notifications in the inventory were initially classified into five major categories from part 1 to 5 and one last category for all others. The classification was considered to be temporary and open to any modification. The Contracting Parties were concerned that their expected benefits from the Kennedy Round be neutralized by adoption of new intensified barriers and, therefore, required the Committee not confine itself to this early classification.⁹⁵ In addition, Canada even suggested that discussion should not be limited to notifying countries and to those maintaining barriers but it emphasized the importance of broadening the list of subjects with all interested countries participating so that contracting parties could provide as much information as possible about each barrier and ensure that the Committee could obtain as a complete global picture of non-tariff barriers as possible.⁹⁶

⁹¹ GATT, L/3083, para.7.

⁹² Winham (1986), pp. 86-87.

⁹³ GATT, L/3083, para.7.

⁹⁴ GATT, L/3083, para. 8. It was also recognized that "these preparations might become entangled in the immense amount of technical detail to be examined. It was thus desirable to adopt a pragmatic approach which should simplify the preparatory work. It was felt that a barrier-by-barrier approach would best meet this criterion and that a first task was therefore to classify the barriers more rationally into categories, grouping them so that those having relation to one another might be considered together...to carry out the analysis..."

⁹⁵ GATT, L/3083, para.11.

⁹⁶ COM.IND/8, p.1.

Box 1. Prior to Tokyo Round - Classification of nontariff barriers⁹⁷

- Part 1. Government participation in trade
- Part 2. Customs and administrative entry procedures
- Part 3. Standards involving import and domestic goods
- Part 4. Specific limitations on imports and exports (quantitative restrictions and the like)
- Part 5. Restraints on imports and exports by the price mechanism
- Part 6. Other restraints on imports⁹⁸

Most of the categories in the classification went through subsequent modifications as more inventories had piled up.⁹⁹ However, the categories for customs procedures and standards had been maintained throughout negotiations. The categories generally served a basis for organizing working groups during the Tokyo Round.¹⁰⁰

4.2.2.2 Building an inventory of standards problems

Within a year, some 800 nontariff measures in 96 countries were notified by all Contracting Parties and they were thought to be in force in nearly all countries parties to the GATT.¹⁰¹ The inventory documents formed the basis for the Committee's analysis during its meeting in 1969 and, under the category, 'Standards involving import and domestic goods', the following standards were identified as relevant non-tariff barriers:

⁹⁷ COM.IND/8, p. 3 and Annex in p.6.

⁹⁸ COM.IND/8, p. 3. Initially, there were some other miscellaneous nontariff measures classified under the category "Others" but they were subsequently discarded. Those under this category were advertising and transportation restraints, screen time requirements, local content and mixing requirements, and restrictive business practices.

⁹⁹ The first reorganized list of notification is provided under the GATT document series COM.IND/6/number.

¹⁰⁰ Winham (1986), p.87.

¹⁰¹ L/3298, para.3. The number of countries maintaining non-tariff or para-tariff measures was calculated by the author based on COUNTRY INDEX TO NOTIFICATIONS IN THE INVENTORY (GATT, COM.IND/W/21, 24 December 1969).

Box 2. Prior to Tokyo Round – Identifying standards-related measures¹⁰²

- Industrial standards
- Health and safety standards
- Weights and measures
- Pharmaceutical standards
- Product content requirements
- Labelling and container regulations
- Processing standards
- Marking requirements
- Packaging requirements

The early standards sub-categories incorporated large coverage. They identified, as technical barriers, industrial standards, health and safety standards, weights and measures, pharmaceutical standards, product content requirements, labeling and container regulations, processing standards, marking requirements, and packaging requirements. Industrial standards, health and safety standards and weights and measures constituted the majority of the category.

The first category would include some of the measures which had tentatively been classified as “industrial standards”, such as specifications regarding performances of electrical goods, steel materials, pressure vessels, as well as many requirements concerning measurements, labelling of product content and ingredients.¹⁰³

Labelling and container, marking and packaging were included at this early stage but had been continuously subject to the subsequent discussions on how to deal with them. Interestingly, at this early stage, processing standards were overtly identified as important standards barriers. In addition, it is noted that pharmaceutical standards, some of which might belonged to health standards, were under one of the sub-categories but were later excluded due to the reason that they either belonged to health standards or to intellectual

¹⁰² Para.11, p.3 and Annex, p.6.

¹⁰³ MTN/3B/3.

property issues. Since a plurilateral agreement for government procurement had been yet to be signed, standards probably included standards applied for government procurement. One member of the Group was of the view that an instrument drawn up by GATT should not, at this stage, include pharmaceutical products which were in a category of their own due to the special health problem involved.¹⁰⁴ At that time, Agriculture standards as well as sanitary and phytosanitary standards were discussed in the Agriculture Committee.

The inventory had no legally binding status. Its primary function was to provide information on what constituted non-tariff barriers in general. It was only intended to be exploratory and preparatory. Thus, it involved no commitment on the part of any member of the Working Group to take or join in any action under discussion, and it is only tentative at the preparatory stage prior to the Tokyo Round.¹⁰⁵

4.2.2.3 An issue of distinguishing voluntary standards from compulsory regulations

Based on the examination of the inventory, the Contracting Parties recognized that there was increasing number of standards and regulations which restricted trades. The standard-related trade barriers were generally identified under categories of standards, regulations and their enforcement. The Contracting Parties initially found it simple to distinguish, stating that the distinction was clearly made between compulsory regulations, issued by central government authorities and standards by local governments or by private organizations.¹⁰⁶

In this early stage of identifying standards trade barriers, the Contracting Parties intended to encourage multilateral harmonization schemes to be open and technical regulations as well as standards of local authorities and private standardization organizations to be prompted to apply international standards and resolve trade difficulties.¹⁰⁷ Specifically with regard to technical regulations, the Contracting Parties found it plausible to take three basic approaches: (a) the development of uniform regulations; (b) the optional approach – a choice between a

¹⁰⁴ Ibid, para. 7.

¹⁰⁵ COM.IND/W/41, p.1

¹⁰⁶ COM.IND/W/36, p. 6. This document summarized the document Spec(70)62.

¹⁰⁷ COM.IND/W/36, p. 7.

national regulation and an international standard; (c) the “reference to standard” approach.¹⁰⁸

However, after having several subsequent meetings, the Contracting Parties realized the importance but, at the same time, the difficulty of making a distinction between regulations and voluntary standards. At this stage of discussion, the Contracting Parties seemed to believe firmly that compulsory regulations were issued by governmental authorities while voluntary standards were usually issued by private organizations on a regional, national or international basis. In addition, the Contracting Parties also noted that voluntary standards were often made *de facto* mandatory by certain government actions such as adopting certain voluntary standards as government procurement standards.¹⁰⁹

Although the Contracting Parties considered two large categories of standards, i.e. mandatory technical regulations and voluntary standards, they considered them from three basic aspects and must have found that those categories are not so different from each other in terms of the Code’s subject matters. The three aspects then considered were their standardization purposes, standardization bodies, and trade effects.

Standardization purposes

The Contracting parties considered purposes of standards measures. There were many cases in which the purpose was obvious and necessary, notably provision of information for protection of consumers and rules for safeguarding of plant, animal and human life. Generally speaking, however, to the extent that the object was to give consumers information helpful in making informed choices of goods suited to their particular purposes, there would seem to be no reason why any category of goods should be excluded on this ground. Only if the second purpose were also involved, i.e. only if health or safety hazards were involved, there would be need to exclude certain types of goods, and even then this should not always be necessary, since a restriction on the end-use of a product might accomplish the purpose.

Beyond the measures which could be explained on these grounds, there remained, however, a larger number of notifications concerning quality standards initially established by trade or professional associations (not always governmental) which appeared to reflect unduly the

¹⁰⁸ COM.IND/W/36, p. 7.

¹⁰⁹ COM.IND/W/36, p. 2.

practices of domestic producers only. In such cases, these standards had come to operate as more or less severe restrictions on the use of imported products of satisfactory quality which, for the reason or another, did not fit within established definitions.

In the absence of more knowledge of the detailed standards of these various bodies, it was not clear to what extent their provisions were confined to legitimate public objectives such as safety and to what extent they might constitute something resembling restrictive business practices with de facto limiting effects on import competition. This problem was all the more serious as some such standards were gradually being written into local building code, fire regulations, and specifications for public contracts. Even when this was not the case, consumer acceptance might severely restrict the sale of potential of products lacking the customary “seal of approval”.

Standardization bodies

The Contracting Parties noted that role of governments in the field of standardization differed greatly from one country to another. In some countries, there were more government compulsory regulations while, in other countries, there were more voluntary standards developed by private organizations, over which governments had little or no influence. Furthermore, in certain countries regulations were generally issued by the government while in other countries they were in many cases instituted by regional or local authorities.

In this way, the early negotiators noted that there would be a potential problem caused by different standardization bodies and domestic systems in countries, stating that “[t]his great difference in government responsibility in the field of standardization was an important fact to bear in mind when seeking solutions to the problems of non-tariff barriers caused by standards. Some delegations pointed out, however, that the area of voluntary standards were largely confined to industrial products. Safety and health regulations were usually compulsory.”¹¹⁰

Trade Effects

¹¹⁰ COM.IND/W/36, para 6.

The Contracting Parties considered trade effects of standards in their Inventory Examination Reports. They noted that the development and enforcement of standards and regulations can have the trade barrier effects in different ways. For example, they considered trade restrictive effects resulted from characteristics peculiar to national production, frequent modifications and their uncertainty, and short period of notice. These kinds of trade effects are caused by both compulsory regulations and voluntary standards.¹¹¹

The Contracting Parties also noted some trade effects are resulted from different types of standardization bodies' membership, including producers, consumers, local authorities, government or mixed ones.¹¹² The Contracting Parties found that most of technical barriers are based on equal treatments between national products and imported products. However, disparities between countries in standards and regulations sometimes took place, putting foreign products at disadvantage, which become frequently apparent in the case of methods of enforcing standards such as testing or production inspection and certification.¹¹³

Thus, the Contracting Parties noted that trade restricted effects are caused by development or regulation or standards as well as in the method of enforcement of regulations or standards regardless of whether there are origin-based discriminatory practices or not. Therefore, in terms of their trade effect, a distinction between regulations and standards was not so meaningful.

4.2.2.4 An issue of balancing the resulting imbalance of implementation burden

The Contracting Parties felt that it was desirable to establish a set of principles or ground rules on standardization. At that time, the Contracting Parties could not yet determine the form of those rules and principles, whether a code or guidelines or whether on a contractual or voluntary basis.¹¹⁴ However, the Contracting Parties seemed to have agreed that a set of principle or rules would be invalid if they are not applied to regulations imposed by public

¹¹¹ COM.IND/W/36, para 7.

¹¹² COM.IND/W/36, para 8.

¹¹³ COM.IND/W/36, para. 9.

¹¹⁴ COM.IND/W/36, para. 13.

authorities at national level.¹¹⁵

Then, there was a critical implementation problem in designing a code of guidelines since they would not put reciprocal burden on the Parties' responsibility for implementation and, thus, imbalance among the Parties in their compliance.¹¹⁶ On the other hand it was pointed out that a code or guidelines would materially assist governments who did not direct responsibilities in the field of standardization to influence local authorities and private standardization bodies to align their practices and bring them into conformity with these guidelines. Additionally such a code or guidelines would have influence on the work of international standardization bodies.

In the meantime, it was suggested that the code of guidelines might also deal with those areas where there was difficulty in reconciling the objective of maintaining adequate standards with the most-favoured-nation principle. In the negotiators' view, such a code of guidelines should supplement rather than replace existing GATT provisions such as those in Article XX.¹¹⁷

4.2.3 The 1973 draft *Standards Code*

4.2.3.1 Regulatory structure of the 1973 Draft Standards Code

The earliest available draft code for preventing technical barriers to trade prior to the Tokyo Round Declaration is the proposed draft code of 1973 (hereinafter "1973 Draft Code").¹¹⁸ In the text, drafters basically identified technical barriers in three categories: standards, conformity with standards and quality assurance systems. Then, standards are further divided into mandatory standards and voluntary standards. The term "mandatory standards"

¹¹⁵ COM.IND/W/36, para. 14. "It was pointed out, within GATT, guidelines would have possible constraining offers only if they applied to regulations imposed by public authorities at national level. Such guidelines would have little significance with respect to regulations issued by local public authorities or as regards the numerous private standards and private control or testing procedures. These guidelines might not offer an effective solution for problems arising from such regulations, standards and control procedures. Also they would not constitute a comparable commitment on the part of all contracting parties."

¹¹⁶ COM.IND/W/36, para. 15.

¹¹⁷ COM.IND/W/36, para. 16.

¹¹⁸ COM.IND/W/108, p4-27.

is supposed to embrace “what would normally be described as technical regulation” in accordance with the footnote 2 of the Annex 1.2 to the 1973 Draft Code.

Each term is defined in the Annex. The meanings of the term “standard”, “mandatory standard” and “voluntary standard” are provided in such a way that the entire coverage of the proposed Agreement is delineated through the definition of the term “standards” and then, the entire scope is divided into two categories, mandatory standards and voluntary standards, for which respective definitions are provided. As long as a certain specification is found to be a “standard” within the definition, it should belong either to the category of “mandatory standards” or to the category of “voluntary standard”. The categories are exclusive to each other. Therefore, the finding that a certain standard is a “mandatory standard” inevitably leads to the determination that the standard is not a “voluntary standard” and vice versa.

Conformity with standards generally refer to test methods and administrative procedures for determining conformity with mandatory standards of central government, local government and other regulatory bodies and assurance of the conformity. According to its definition provided in Annex 1 to the Draft Code, ‘conformity with standards’ means that the actual performance or properties of a product satisfy the performance or properties which are specified in the relevant standard.¹¹⁹ “Administrative procedures” are defined as the overall administrative procedures which are required to carry out in order to ascertain that products conform to certain relevant standards. It may include administrative arrangements for controlling the frequency and location of tests, for carrying out tests and for supervising the control of quality by producers.¹²⁰

Quality assurance systems refer to certification systems. They are specifically defined as a formal arrangement having its own rules of procedure and management under which one or more quality assurance bodies provide an assurance that products approved or certified under the system conform to the requirements of the standards in question.¹²¹

¹¹⁹ 1973 Draft Code, Annex 1, paragraph 12.

¹²⁰ 1973 Draft Code, Annex 1, paragraph 13.

¹²¹ 1973 Draft Code, Annex 1, paragraph 16.

Box 3. Prior to Tokyo Round – Provisions for “standards” in the 1973 Draft Standards Code¹²²

.....	
Chapter II - Operative Provisions	
A. Standards	
Section 2	Preparation, adoption and use of mandatory standards by central government bodies
Section 3	Preparation, adoption and use of mandatory standards by local government bodies and regulatory bodies other than central government bodies
Section 4	Preparation, adoption and use of voluntary standards
.....	

Based on the two categories of standards, the 1973 Draft Code establishes its regulatory structure as show in <Box 3>.¹²³ Article 2 in the 1973 Draft Code is applied to preparation, adoption and use of mandatory standards by central government bodies and Article 3 to preparation, adoption and use of mandatory standards by local government bodies and regulatory bodies other than central government bodies. Article 4 is applied to preparation, adoption and use of voluntary standards.

Thus, the early design of the regulatory structure was such that technical regulations and standards were addressed by different provisions, i.e. not identical sets of rules. It is also noted that the regulatory structure is established not only based on two different sources of technical barriers but also based on their standardizing bodies. Provisions for mandatory standards are further divided according to the levels of their standardizing bodies, and therefore, Article 2 is applied to central government bodies’ mandatory standards and Article 3 to those of local and regulatory bodies other than central government bodies.

In addition, definitions of mandatory standards bodies are provided. Central government

¹²² COM.IND/W/108, pp.4-6.

¹²³ The complete regulatory structure of the 1973 Draft Code is based on three sources of technical barriers, namely, standards, conformity with standards, and quality assurance systems. Articles 2 through 4 address standards; article 5 through 8 deal with conformity with standards; and articles 9 through 15 are applied to quality assurance systems. For the purpose of this study, analysis and discussion will be focused on “standards” only.

body and local government body are defined in terms of their normal meanings. Regulatory body is defined as “any central or local government body or any other body which has legal power to enforce a mandatory standard.” Therefore, it is clearly provided that mandatory standards body, no matter whether governmental or non-governmental, needs to acquire legal power to make the compliance with the standard mandatory.

Figure 5. Regulatory scope of the 1973 Draft Standards Code

	Mandatory standards	Voluntary standards
Central government bodies	Article 2 Preparation, adoption and use of mandatory standards by central government bodies	
Local government bodies	Article 3 Preparation, adoption and use of mandatory standards by local government bodies and regulatory bodies other than central government bodies	
Non-government bodies		Article 4 Preparation, adoption and use of voluntary standards

Source: Author’s analysis

On the contrary, the standardizing bodies for voluntary standards are defined in the Annex 1 as “any non-governmental organization which prepares voluntary standards for public use. Some of these are national standards bodies as defined [in the Annex]”¹²⁴ and a national standards bodies is defined as “a nationally recognized standards body which is, or is eligible to become, a member of non-governmental international standards bodies”. Therefore,

¹²⁴ COM.IND/W/108, 1973 Draft Code, Annex 1.8, p. 25.

unlike the legal status of the standardizing bodies which prepare, adopt and use mandatory standards, voluntary standards bodies are non-government bodies according to the definition and therefore they are not required to possess any legal power.

Accordingly, a conceptual concept of the 1973 Draft Code is drawn in <Figure 5>. Columns are divided based on the two different standards - mandatory standards and voluntary standards. Different rows indicate three different levels of the standardizing bodies - central, local and non-government bodies. The entire shaded space of the six inner boxes represents the entire scope that the Draft can possibly incorporate, which actually is covered by the current WTO TBT Agreement, and the bold lines surrounding each inner cell show the virtual scope of each relevant provision.

The result of the analysis shows that the scope of the 1973 Draft Code was quite limited, covering, on the one hand, mandatory standards of regulatory bodies with legal power (central, local, or non-governmental) and, on the other hand, voluntary standards of non-governmental voluntary standardizing bodies.

4.2.3.2 Distinction between mandatory standards and voluntary standards

Broad definition of standards

The Contracting Parties in the early 1970s had difficulty in choosing the right terminologies to indicate the categories of standards-related non-tariff barriers which they intended to address and discipline through enactment of a code of conduct.

It seems that they have recognized broad and various meaning of the term ‘standards’ and ‘quality assurance’ and they have made it clear that the Draft Code would take relatively broad meanings of the terminologies. Therefore, the preamble of the ‘Annex 1: Definition’ explicitly recognizes that the terms regarding standards and quality assurance ‘are used in a variety of sense in different contexts and by different organizations.’¹²⁵

Annex 1.1 defines “standards” in a very broad sense. They are, within the meaning of the Draft Code, “any specification which lays down some or all of the properties of a product in

¹²⁵ COM.IND/W/108, 1973 Draft Code, Annex 1, preamble.

terms of quality, purity, nutritional value, performance, dimensions, or other characteristics”.¹²⁶ They may also include test methods, and specifications concerning testing, packaging, marking or labelling to the extent that they affect products rather than processes.¹²⁷ However, they do not cover standards which are “prepared for use by a single enterprise, whether governmental, semi-governmental or non-governmental, either for its own production or purchasing purposes.”¹²⁸ The footnote to the definition adds that “[t]he term “standard” as used in this code has a wider meaning than in customary usage.”¹²⁹

Thus, the term ‘standard’ at the time seems to have been intended to be quite broad and inclusive. It represented the entire coverage of the Draft Code and probably all perceived sources of technical barriers which the Draft had intended to address. As shown in the Annex, the term ‘standard’ covers not only substantive technical specifications but certain procedures like conformity procedures and quality assurance systems such as ‘testing’. Also, the Draft’s preamble states that the adherents desire to “ensure that standards and methods for assuring conformity with standards do not create obstacles to international trade”.¹³⁰ Here, the term ‘standards’ is probably meant to include both mandatory standards or technical regulation and voluntary standards.

Distinction between mandatory and voluntary standards

The Draft Code divides standards into ‘mandatory standards’ and ‘voluntary standards’ depending on the compliance formality. ‘Mandatory standard’ means ‘a standard with which it is obligatory to comply by virtue of an action by an authority endowed with the necessary legal power. The term includes the associated administrative provisions.’¹³¹ As additionally explained in the footnote to the definition, the term ‘mandatory standard is used

¹²⁶ COM.IND/W/108, 1973 Draft Code, Annex 1.1, first sentence.

¹²⁷ COM.IND/W/108, 1973 Draft Code, Annex 1.1, second sentence.

¹²⁸ COM.IND/W/108, 1973 Draft Code, Annex 1.1, third sentence.

¹²⁹ COM.IND/W/108, 1973 Draft Code, Annex 1.1, footnote 1.

¹³⁰ COM.IND/W/108, 1973 Draft Code, preamble, 4th recital. The preamble also provides that the Contracting Parties recognize that “no country should be prevented from taking measures necessary for the protection of human, animal or plant life or health, environment and national security, or for the prevention of deceptive practices” Here, the term ‘measure’ is used probably referring to measures in general, implying that there may be certain measures which are subject to the Draft Code and these categories are what is called ‘mandatory standards’ or technical regulations within the meaning of the Draft Code. 1973 Draft Code, preamble, 5th recital.

¹³¹ COM.IND/W/108, 1973 Draft Code, Annex 1.2.

to embrace what would normally be described as technical regulation.’¹³² Therefore, ‘mandatory standards’ includes technical regulations as its subset. On the other hand, ‘voluntary standard’ is defined as ‘a standard with which there is no legal obligation to comply’.¹³³ In fact, all the other standards which are not considered to be mandatory standard would belong to the category of voluntary standards.

The distinction is supposed to be made based on two main aspects of the standards in question. One aspect is the legal status of the standardizing entity and the other is the question of whether the compliance with the standard is made mandatory or not. If the standard in question is obligatory to comply and such obligation is “by virtue of an action by an authority endowed with the necessary legal power”, then such a standard is considered to be a “mandatory standard”. On the contrary, in case of voluntary standard, there is no obligation to comply.

Table 4. Terminologies and Definitions of the 1973 Draft Standards Code

Terminology	Definitions
1. <i>Standards</i>	The term “standard” means any specification which lays down some or all of the properties of a product in terms of quality, purity, nutritional value, performance, dimensions, or other characteristics. It includes, where applicable, test methods, and specifications concerning testing, packaging, marking or labelling to the extent that they affect products rather than processes. It excludes standards which are prepared for use by a single enterprise, whether governmental, semi-governmental or non-governmental, either for its own production or purchasing purposes. ¹³⁴ <Footnote 1> The term “standard” as used in this code has a wider meaning than in customary usage.
2. <i>Mandatory Standards</i>	This is a standard with which it is obligatory to comply by virtue of an action by an authority endowed with the necessary legal power. The term includes the associated administrative provisions. ¹³⁵ <Footnote2> The term “mandatory standard” is used to embrace what would normally be described as technical regulation.
3. <i>Voluntary</i>	This is a standard with which there is no legal obligation to comply. ¹³⁶

¹³² COM.IND/W/108, 1973 Draft Code, Annex 1.2, footnote 2.

¹³³ COM.IND/W/108, 1973 Draft Code, Annex 1.3.

¹³⁴ COM.IND/W/108, 1973 Draft Code, Annex 1.1.

¹³⁵ COM.IND/W/108, 1973 Draft Code, Annex 1.2.

¹³⁶ COM.IND/W/108, 1973 Draft Code, Annex 1.3.

<i>Standards</i>	
5. <i>Central government body</i>	This term means the central government, its ministries and departments or any body subject to the control of the central government in respect of the activity in question. In the case of the European Economic Community the provisions governing central government bodies [would] apply. ¹³⁷
6. <i>Local government body</i>	This term means a government body which is not subject to the control of the central government in respect of the activity in question, such as (i) the authorities of States, Provinces, Lander, Cantons, etc. in the case of a federal or decentralized system, and (ii) local government authorities. ¹³⁸
7. <i>Regulatory Body</i>	This term means any central or local government body or any other body which has legal power to enforce a mandatory standard. This may or may not be the same body which prepared or adopted the standard. ¹³⁹
8. <i>Voluntary Standards Body</i>	This term means any non-governmental organization which prepares voluntary standards for public use. Some of these are national standards bodies as defined below. ¹⁴⁰
9. <i>National Standards Body</i>	This term means a nationally recognized standards body which is, or is eligible to become, a member of non-governmental international standards bodies.” ¹⁴¹

In this early draft text of the Code, it was clear that a decisive criterion for dividing mandatory standards and voluntary standards was legal obligation to comply. The mandatory character of the compliance could be judged by legal basis of the standard in question and legal characteristics of the standards body. Standards which were legally enacted and enforced based on law by a regulatory body, all central and local governmental bodies as well as some non-government bodies with legal power would be considered mandatory standards. Voluntary standards are those standards, compliance with which is not mandatory and which are prepared, adopted and used by non-government bodies. The factor of ‘legal’ enforcement or enforcement based on law was critical in distinguishing mandatory standard and voluntary standard.

Domestic Standardizing Bodies

The distinction between ‘mandatory standard’ and “voluntary standard” becomes even clearer when the characteristics of their standardizing bodies are considered. The 1973 proposed GATT Code of Conduct for Prevention Technical Barriers to Trade mentions four

¹³⁷ COM.IND/W/108, 1973 Draft Code, Annex 1.5.

¹³⁸ COM.IND/W/108, 1973 Draft Code, Annex 1.6.

¹³⁹ COM.IND/W/108, 1973 Draft Code, Annex 1.7.

¹⁴⁰ COM.IND/W/108, 1973 Draft Code, Annex 1.8.

¹⁴¹ COM.IND/W/108, 1973 Draft Code, Annex 1.9.

groups of domestic standardizing bodies, i.e. ‘central government bodies’, ‘local government bodies’ and ‘regulatory bodies other than central government bodies’, and ‘non-government bodies’.

Majority of provisions applicable to ‘mandatory standard’ are entitled with specific mentioning of their standardizing bodies. For example, articles such as Section 2, 5, 6, 9 and 13 in the Code are entitled with the phrase ‘mandatory standards by(of) central government bodies’, showing that mandatory standards may be associated with central government bodies. In addition, Section 3, 7, 11, and 14 are entitled with the phrase ‘mandatory standards by(or of) local government bodies and regulatory bodies other than central government bodies’, showing that mandatory standards may also be prepared, adopted and used by local government bodies or regulatory bodies.

Definitions in the Annex provide what each body means. In Annex 1.5, ‘[c]entral government body’ is defined as ‘the central government, its ministries and departments or any body subject to the control of the central government in respect of the activity in question. In the case of the European Economic Community the provisions governing central government bodies [would] apply’.¹⁴² In addition, ‘[l]ocal government body’ is defined in Annex 1.6 as ‘a government body which is not subject to the control of the central government in respect of the activity in question, such as (i) the authorities of States, Provinces, Lander, Cantons, etc. in the case of a federal or decentralized system, and (ii) local government authorities’.¹⁴³ Furthermore, according to Annex 1.7, ‘[r]egulatory body’ means ‘any central or local government body or any other body which has legal power to enforce a mandatory standard. This may or may not be the same body which prepared or adopted the standard’.¹⁴⁴

On the contrary, provisions applicable to ‘voluntary standards’ rarely mentions the types of standardizing bodies. Articles regulating voluntary standards such as Section 4, 8, 10, 12, and 15, for instance, do not state relevant standardizing bodies in their titles. However, Annex 1.8 defines ‘voluntary standards body’ as ‘any non-governmental organization which prepares voluntary standards for public use. Some of these are national standards bodies as

¹⁴² COM.IND/W/108, 1973 Draft Code, Annex 1.5.

¹⁴³ COM.IND/W/108, 1973 Draft Code, Annex 1.6

¹⁴⁴ COM.IND/W/108, 1973 Draft Code, Annex 1.7.

defined below'.¹⁴⁵ Subsequently, Annex 1.9 defines 'national standards body' as '[t]his term means a nationally recognized standards body which is, or is eligible to become, a member of non-governmental international standards bodies'.¹⁴⁶

The differences may clearly reflect how the Contracting Parties perceived the two types of standards, namely mandatory standards (or technical regulations) and voluntary standards. The 1973 Proposed Draft Code shows that the Contracting Parties understood that 'mandatory standards' were commonly prepared, adopted and used by central and local government bodies or any regulatory bodies with legal enforcement power while 'voluntary standards' were usually prepared, adopted and used by non-government bodies which had no legally enacting or enforcing power regardless of whether they were nationally recognized or not.

Thus, it can be inferred from the terminology that 'standards' defined in the Code practically consist of two dimensions: (i) legally enforced 'mandatory standards' by or of government bodies or some regulatory bodies endowed with necessary legal power and (ii) 'voluntary standards' under no legal enforcement regardless of the status of their standardizing bodies, national, local or non-governmental.

4.2.3.3 Disciplines for mandatory standards and voluntary standards

Article 2 in the 1973 Draft Code is applied to preparation, adoption and use of mandatory standards by central government bodies and Article 3 to preparation, adoption and use of mandatory standards by local government bodies and regulatory bodies other than central government bodies. Article 4 is applied to preparation, adoption and use of voluntary standards.

Disciplines of the three articles are mostly the same, but depending on the legal status of standardization body, strictness of implementation differs. To mandatory standards prepared, adopted and used by central government bodies, a stricter level of implementation is applied through the phrase "...shall ensure that...". To mandatory standards by local government and regulatory bodies and voluntary standards, a less strict and indirect obligation to

¹⁴⁵ COM.IND/W/108, 1973 Draft Code, Annex 1.8.

¹⁴⁶ COM.IND/W/108, 1973 Draft Code, Annex 1.9.

implement is applied based on the phrase “[a]dherents...shall use all reasonable means within their power to ensure...”.

Table 5. Common disciplines for mandatory standards and voluntary standards in the 1973 Draft Standards Code

	Mandatory Standards	Voluntary Standards
Not... with a view to creating unnecessary obstacles to international trade	2(a)	4(a)
Use international standards as a basis	2(b)	4(c)
Participation(or cooperation) in international standardization	2(c) “...shall play a full part...”	4(b) “...shall cooperate...”
In terms of performance rather than detailed design	2(d)	4(e)
Except where the technical content... is substantially the same... - publish a notice - provide ... a copy... upon request - allow reasonable time for comment - take account of comments	2(e)(i) 2(e)(iii) 2(e)(iv) 2(e)(v)	4(f)(i) 4(f)(ii) 4(f)(iii) 4(f)(iv)
Publish all ...standards	2(g)	4(h)
Compliance by regional bodies	2(j), 2(k)	4(j), 4(k)

Source: Author’s analysis

Mandatory standards and voluntary standards are subject to almost the same rules and obligations. Neither mandatory or voluntary standards themselves nor their applications should be prepared, adopted or applied with a view to creating obstacles to international trade or have the effect of creating an unjustifiable obstacles to international trade.

The 1973 Draft Code requires use of relevant international standards as a basis and adherents’ participation in international standardization; obligates standards to be established based on performance rather than detailed-designs; provides transparency rules for mandatory or voluntary standards which are not substantially the same as the technical content of an international standard.

In general, adherents must publish all mandatory standards. Likewise, they shall use all reasonable means within their power to ensure that standardizing bodies publish all voluntary

standards. They shall also use all reasonable means within their power to ensure that regional standards bodies comply with provisions of the 1973 Draft Code in general and shall fulfill the provisions except to the extent that the regional standards bodies have fulfilled those obligations.

There are a few articles which provide different disciplines regarding mandatory standards and voluntary standards.

First, Article 4(d) provides disciplines for the case where adherents use voluntary standards in establishing mandatory standards. It requires adherents to ensure that where aspects of a product are, or are likely to be, subject to a mandatory standard by a central government body, any voluntary standard which is to cover those aspects is suitable in form and content for use in whole or in part for the purpose of that mandatory standard.

Second, Article 2(e)(ii) and 2(h) provides stronger transparency rules concerning mandatory standards whereas there are no provisions requiring for comparable obligations. The former article obligate central government bodies to notify to the GATT Secretariat in case where mandatory standards deviate from relevant international standards. The latter provision requires adherents to allow a reasonable interval between the publication of the mandatory standard and its entry into force so that producers in exporting countries adapt their products or methods of production to the requirements of the importing country, except where there are urgent problems of public safety, health, environmental protection or national security.

Third, exceptions to transparency procedures stipulated respectively in Article 2(e) and 4(e) concerning mandatory standards and voluntary standards are provided in Article 2(f) and 4(g). Grounds for invoking the exceptions, however, differ between mandatory standards and voluntary standards. With respect to mandatory standards, adherents may omit such of the steps in the transparency provisions as they find necessary, 'where urgent problems of safety, health, environmental protection or national security exist'. Grounds for invoking the exception as regards to mandatory standards, thus, are related to the urgent situation that may arise. On the contrary, grounds for invoking such exception in case of voluntary standards are more relevant to the purposes of the standards. Regarding voluntary standards, any of the transparency procedure may be omitted, if necessary, 'where a voluntary standard is prepared for the purpose of meeting an urgent problem of safety, health or environmental

protection.

4.3 “Standard” during the Tokyo Round Negotiations

4.3.1 The TBT subgroup of the Trade Negotiation Committee

Tokyo Round negotiation launched with Tokyo Declaration adopted in Tokyo Ministerial Conference held in September 1973. Immediately after the Tokyo Ministerial meetings, a Trade Negotiation Committee (TNC) was created under paragraph 10 of the Declaration and was mandated to plan and set up proper procedures and supervise the overall progress of the negotiation. The TNC itself was not intended to be a forum for negotiation since the agenda was extensive and technical. Instead, the TNC created six specialized subcommittees, conforming to the six negotiating areas outlined in paragraph 3 of the Declaration.

Box 4. Tokyo Round - Subcommittees of the Trade Negotiation Committee

- | | |
|--------------|---|
| ▪ Group 3(a) | Negotiations on tariffs |
| ▪ Group 3(b) | Reduction or elimination of nontariff measures; or their trade-distorting effects |
| ▪ Group 3(c) | Examination of the sector approach as a complementary negotiating technique |
| ▪ Group 3(d) | Examination of the multilateral safeguards systems |
| ▪ Group 3(e) | Negotiations on agriculture |
| ▪ Group 3(f) | Negotiations on tropical products |

The six subcommittees were respectively assigned to deal with negotiations on tariffs,

reduction or elimination of nontariff measures, examination of the sector approach as a complementary negotiating technique, examination of the multilateral safeguard systems, negotiations on agriculture, and negotiations on tropical products. They were, thus, assigned to continue and complete initial preparations for the negotiation.

Following the February 1974 meeting of the TNC, subcommittees began to work. Each operational group held a series of meetings and submitted progress reports at the meetings of the TNC. The TNC received these reports and assigned additional tasks to be subsequently reported or completed by designated dates. Thus, the TNC met regularly throughout the negotiation to receive normal report of the subcommittees and monitored the pace and substance of the negotiation.¹⁴⁷

Among the subcommittees, Group3(b) was assigned for non-tariff trade barriers. The Group began its work by updating the inventory of nontariff measures and reassessing the categories of measures in the light of their usefulness in future negotiation.¹⁴⁸ This data-gathering and build-up of common information was to be separated from negotiation as much as possible. In the meantime, the GATT Secretariat was asked to prepare progress reports on the contemporary developments and works of the Economic Commission for Europe (ECE) and the Customs Cooperation Council.

Box 5. Tokyo Round - Subgroups of nontariff measures group

Group	Subgroup
Nontariff measures	(i) Quantitative Restrictions (ii) Technical Barriers to Trade (iii) Customs Matters (iv) Subsidies and Countervailing Duties (v) Government Procurement (added in July 1976)

The structure of subcommittees went through two major changes during 1974, which were confirmed in a meeting of the TNC in February 1975. Departing from the titles established in the Tokyo Declaration, the titles of working groups were changed to describe

¹⁴⁷ For the general negotiation procedures and operation, see Winham (1986), p. 97-100.

¹⁴⁸ MTN/3b/7.

substantive issues they were assigned to address. The title ‘Group 3(b)’, for example, was changed to ‘Nontariff Measures Group’.

The other change was to further categorize the Group into subgroups. Thus, the Nontariff Measures group was divided into five specific subgroups such as subgroups for quantitative restrictions, technical barriers to trade, customs matters, subsidies and countervailing duties, and government procurement (newly added in July 1976). This structure remained mostly unchanged throughout the negotiation.

It was the TBT Subgroup which led meetings and negotiations to establish a TBT Code preventing such technical trade barrier as those resulting from standards, technical regulations, packaging, labelling, conformity assessment procedures and certification systems. Unlike other subgroups, the TBT Subgroup already had a proposed draft code in which most of the detailed provisions and obligations had been decided before the adoption of the Tokyo Declaration.¹⁴⁹ Most of its jobs during the Tokyo Round, therefore, was concentrated on fine-tuning certain provisions on which countries had different views. Among several issues, the most fundamental and difficult ones were related to the coverage of the Code and reciprocity and ways to solve such imbalances among the prospective parties.

4.3.2 Overview of major issues negotiated during the Tokyo Round

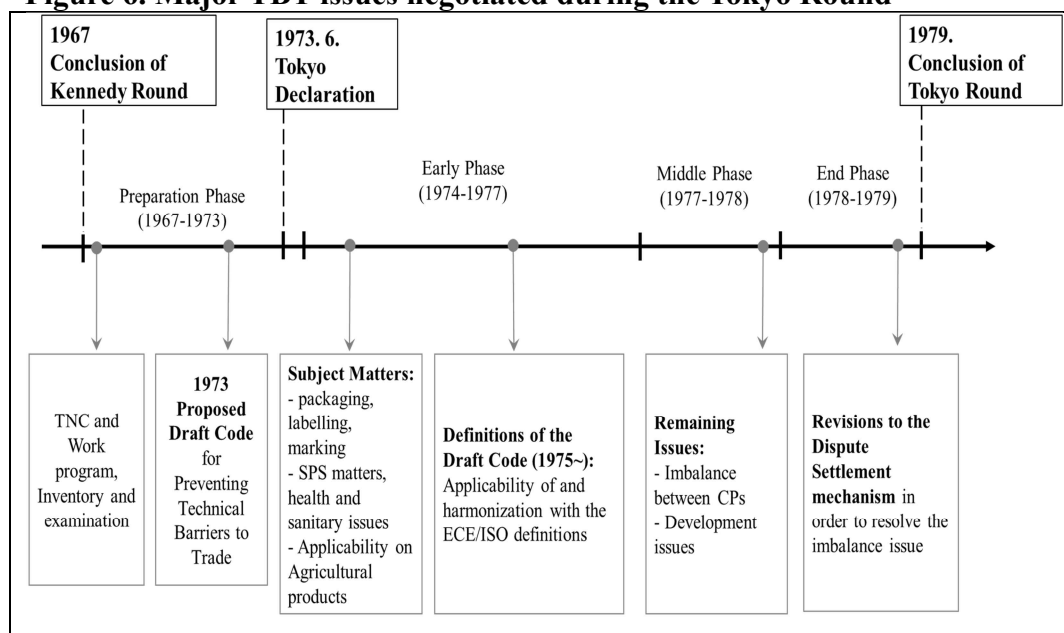
As explained above, the progress of negotiations regarding standards issues was swift and smooth, facing few challenges and hindrances until the very last stage of the Tokyo Round negotiations. This section briefly introduces major issues of the standards code negotiations and provides an overview of the entire negotiation process as illustrated in <Figure 6> The entire timeline of the negotiations for standards code is divided into three time periods according to Winham (1986).

In specific, the early phase spans from 1974 to 1977, the middle phase from 1977 to 1978 and the end phase from 1978 to 1979. The negotiation for the Standards Code was speedy so that not many technical issues were left undecided even during the early phase. Thus, in this early phase, the Contracting Parties discussed the coverage of subject matters and

¹⁴⁹ Winham (1986), p. 90.

consistency of the proposed Code's terminologies and concepts with their corresponding terms and definitions of the ECE/ISO Guide. Then, after the middle phases, there were few technical issues left unresolved except for the issue of imbalance and difficulties that developing countries had faced in implementing the proposed Standards Code. Finally, the Contracting Parties had to compromise the imbalance issue by adopting a dispute settlement system. The overall progress of the negotiations for the Standards Code is summarized and illustrated in a brief flow chart shown in <Figure 6>.

Figure 6. Major TBT issues negotiated during the Tokyo Round



Source: Author's analysis

Specific discussions and negotiations for establishing a TBT code began right after the conclusion of the Kennedy Round. In this preparatory stage, inventories were gathered and common knowledge and information regarding nontariff measures was built. Based on a series of inventory examinations, negotiators determined four categories of technical barriers to trade, namely, mandatory standards, voluntary standards, conformity with them and

certification systems, and established rules and obligations to regulate them.¹⁵⁰ At that time, TBT issues were new and generally not so well-known to the Contracting Parties, not to mention that they were politically sensitive.¹⁵¹ As a result, the establishment of a proposed draft code for preventing TBT had progressed without much difficulty and, in June 1973, three months prior to the Tokyo Declaration, a concrete proposed draft had been completed and circulated among the Contracting Parties.

As the Tokyo Round initiated, the first task of the TBT subgroup was to determine the coverage of the Code. Therefore, the subgroup reviewed feasibilities of applying the Code to such technical barriers as packaging, labelling and marking, SPS matters, health and sanitary issues as well as technical barriers for agricultural products. In the meantime, the ECE/ISO was developing definitions of terminologies relating to standards and, when it had completed, the subgroup examined whether it would be appropriate to import or harmonize the TBT Code with the ECE/ISO definitions and, if so, how should the harmonization be brought about, adoption as a whole or in part.

During the middle phase, as the Code was pushed for adoption, one last issue was found to be critical and important. It was issue of reciprocity. Countries had different standard and standardization systems: some countries have centralized standardization system while the other have decentralized one intrinsic to their federal government system. As a result, the same obligation would have different impact or burden of implementation on countries with different standards systems. The EU, for instance, whose standard system was quite centralized, meaning most of their standards at the EU level were legally binding would be bound by heavier burden of implementation than the US, whose standard system was led by private institutions and most of its standards were not mandatory standards within the meaning of the Code.

This fundamental reciprocity problem was resolved during the final stage as the subgroups made some revisions to the Code's dispute settlement system. The revised dispute settlement mechanism provided that central governments were fully responsible for the Code's implementation no matter whether their standard system was central or federal. As a result, the EU, for instance, could sue the US when non-government standardizing bodies of

¹⁵⁰ See Chapter 4.1.2 of this thesis for more explanations.

¹⁵¹ Winham (1986), pp. 195-197.

the latter acted inconsistently with the rules and violation of the Code.

4.3.3 Coverage of the draft *Standards Codes*

In *standards* negotiations, the Working Group noted that the coverage of the Code was not so clear. In general, the Group agreed that the Code would apply to trade in industrial product, and would apply neither to standards used for government procurement purposes nor to those used by private companies not to service standards. However, ambiguity existed especially as regards to such subject matters as agricultural products, labelling and packaging, and marks of origins. The Group need to discuss whether the proposed Code should deal with standards issues related to these matters and, if so, how should they be regulated.

4.3.3.1 Applicability of the Code to agricultural products and SPS measures

As negotiation proceeded, the Group noted that the coverage of the Code was not limited to industrial products. Standard issues were not restricted to trade in industrial products but they often involved problems of trade in agricultural products. The Secretariat noted that the proposed Code made no distinction between standards according to their related types of products.¹⁵² In addition, it considered that some provisions in the Code could be regarded as having particular bearing on standards affecting agricultural products in practice. For example, provisions stipulating exemption to certain transparency procedures in case of urgency would probably refer to sanitary and quarantine procedures for agricultural products. Therefore, the Group 3(b) needed to discuss with Negotiation on Agriculture Group 3(e) in order to review the applicability the Code to agriculture products.¹⁵³ The main issue was to examine whether the Code provides an effective method of dealing with the adverse trade effects of sanitary and phyto-sanitary measures, and if not, what changes needed to be made

¹⁵² MTN/3E/W/26, para. 3.

¹⁵³ GATT, COM.IND/W/108, para. 16.

or what would be an appropriate and effective approach.

Basically, three approaches were discussed to deal with sanitary or phytosanitary trade barriers. First approach was to lean on the jurisdiction of the “Committee for Preventing Technical Barriers to Trade” envisaged in Article 19 of the 1973 Draft Code; another approach was to establish a self-contained Code; and another alternative was to deal with the adverse trade effects on an individual or product by product basis. The second approach had particular advantage since the “Enforcement” Article 21 specifically provides arbitral or consultative procedures if there was a provision which incorporates sanitary and phytosanitary measures in the Code’s coverage.¹⁵⁴

The first approach, on the other hand, may be appropriate and adequate enough since the power conferred on the Committee may enable any contracting party or any competent body to consult for such specialized questions. The idea was that the Code covers many aspects of standards which affect agricultural products in the same way that industrial products would be covered and thus, sanitary and phyto-sanitary matter could be dealt with separately under the auspice of the Code.

In order for SPS measures to be covered by the Code, they must come within the meaning of “standards” as defined in the Code. The Working Group found it clear that a large range of SPS measures would be covered by the definition of ‘standard’, but less certain as regards to measures relating to processes and production methods.¹⁵⁵ In addition, another aspect of the code’s coverage was related to an issue whether the definition of “standard” only includes “test methods” to the extent that they affect products rather than processes.¹⁵⁶

There was a view that, in some cases, such requirements would not seem to relate to the properties of a product as such and therefore, they are not covered as “standards”. On the other hand, there was an opposite view that such requirements are covered by the code since they comprise “the properties of a product in terms of ... other characteristics”. In this case, the Group had to consider whether a certain class of sanitary or phytosanitary measures

¹⁵⁴ MTN/3E/W/26, paras. 4-6.

¹⁵⁵ Examples of SPS measures the Group considered included hygiene standards relating to the incidence of parasitic and cystic diseases or to permissible levels of residues in meat, processed foods etc. On the other hand, examples of SPS process and production measures were, measures relating to process, to conditions in slaughter houses, dairy factories or processing establishments, or to conditions affecting producing countries with respect to the incidence of certain diseases.

¹⁵⁶ MTN/3E/W/26, para 8.

should be covered through a broad interpretation of a phrase such as “other characteristics”.¹⁵⁷

In addition, the Group had to clarify whether the definition cover live animals if the proposed code applied standards which in turn are defined in terms of the properties of a product. It was not clear whether a live animal to be regarded as a product for the purposes of the code. In other words, it had to be made clear that the term “product” meant the product of a manufacturing process or, otherwise, anything which is the subject of commercial activity.¹⁵⁸

Then, the Group reviewed provisions of the code which already covered or could cover subject matters of agricultural products and SPS measures. It noted that certain provisions of the code could be interpreted as having in practice a particular bearing on standards affecting agricultural products. In the fifth paragraph of the preamble to the code, for example, it was recognized that no country should be prevented from taking measures for the protection, inter alia, of human animal or plant life. To the Working Group, it was uncertain whether the provision meant that measures introduced on these grounds were exempted from the provisions of the code. This point was discussed and it was suggested that such measures would be covered although with some modification in the procedural requirements where “urgency” is a factor.¹⁵⁹

In this context, a point has been made that standards have been defined in the Draft Code in terms of quality, purity, nutritional value, performance etc., and, as such, the definition might cover a large number of sanitary and phytosanitary measures including those relating to the incidence of parasitic and cystic disease, permissible levels of residues in meat and processed foods, etc. It was, however, not clear whether it would cover regulations relating, inter alia, to the production or processing of a product, including for example, conditions in slaughter houses, dairy factories or other processing plants or to conditions affecting imports from certain producing countries where there was an incidence of certain diseases not prevalent in the importing countries.¹⁶⁰

¹⁵⁷ MTN/3E/W/26, p 7.

¹⁵⁸ MTN/3E/W/26, para 9.

¹⁵⁹ MTN/3E/W/26, para. 10.

¹⁶⁰ MTN/3B/23, para. 31.

4.3.3.2 Applicability of the Code to health and sanitary regulations

The Working Group found that almost all countries had legislation for the protection of the health and safety of their human, animal and plant population. With a view to deal with health and sanitary regulations, the GATT provides some disciplines in provisions of Article XX in dealing with general exceptions. Particularly, the Article's sub-paragraph (b) requires certain criteria to be exempted.

The Working Group noted that a large number of notifications from developing countries reported trade difficulties caused by the existence of what they consider as stringent health and sanitary regulations.¹⁶¹ Such difficulties included the prohibition of imports of certain products from particular sources, or from all sources, difficulties encountered because of the differences in standards concerning the use of additives and coloring materials, the rigorous application of regulations regarding requirements of import permits, production of health certificates and inspection of imports as well as production units and so forth. In their notifications, the products affected by such regulations covered a wide range of agricultural products such as meat and meat products, poultry, fish, hides and skins, vegetables, fruits and processed fruit products. In addition to the high level or totally different qualification in importers' health and sanitary regulations, another cause for trade barrier was based on difficulty in knowing precisely the requirements under the mandatory health and sanitary regulations prescribed by the importing countries.¹⁶²

In the meantime, Agricultural Negotiation Group 3(e) had taken substantial discussion. Possible approaches discussed in the Agriculture Committee with a view to reduce or eliminate the adverse effects of health and sanitary regulations ranged from proposals for guidelines and principles including procedures for multilateral arbitration, to proposals that relied on bilateral consultations, to proposals to supplement GATT XXII consultations procedures and to proposals aimed at strengthening and elaborating Article XX(b).¹⁶³ In sum, they proposed the following elements: (i) elimination of health and sanitary regulations where they no longer meet the requirements of the situation which had motivated their

¹⁶¹ MTN/3B/23, para. 24.

¹⁶² MTN/3B/23, para. 25.

¹⁶³ MTN/3B/23, paras. 27-8.

establishment; (ii) relaxation, where necessary, of measures currently in force so that they would not be more stringent than necessary; (iii) requirement that new measures should not be made more stringent than necessary; (iv) provision of equal treatment for imported and domestically produced goods; (v) requirement that measures taken by State or local authorities are consistent with national and international regulations' (vi) application of health and sanitary regulations on a most-favoured-nation and non-discriminatory basis; and (vii) provision for greater co-operation between exporting and importing countries, with regard to importation, testing and issuance of certifications.¹⁶⁴

Group 3(e) confirmed that some of the above elements and the principles are covered by the Draft Code on Standards and, as such, it would be necessary to examine if its provisions would provide solutions to problems in the field of health and sanitary regulations.¹⁶⁵

4.3.3.3 Applicability of the Code to labelling

The Group 3(b) wanted to clarify the problems which packaging and labelling requirements which were found to create barriers to international trade and to consider whether trade barriers related to packaging and labelling were covered by the proposed GATT instrument for preventing technical barriers to trade or whether a separate instrument should be drawn up to deal with these problems.¹⁶⁶

There was a difference of opinion as to whether problems relating to marks of origin were covered by these terms of reference.¹⁶⁷ Also, some delegation suggested that different problems arose in the field of labelling on the one hand and packaging on the other and that those might therefore be discussed separately. One delegation suggested that there was some overlapping.¹⁶⁸

It was pointed out that in some cases labelling was mandatory as such; in other cases it was not mandatory to label products but if labels were used they had to conform to certain

¹⁶⁴ MTN/3B/23, para. 29.

¹⁶⁵ MTN/3B/23, para. 30.

¹⁶⁶ MTN/NTM/W/5, para. 15.

¹⁶⁷ MTN/3B/12, para. 1.

¹⁶⁸ MTN/3B/12, para. 3.

requirements(conditional labelling); in yet other cases labelling was not subject to regulations (voluntary labelling). There were two types of mandatory requirements; in the first it was mandatory to show certain information and in the second it was mandatory to present information in a certain way.¹⁶⁹

Some delegation said that conditional labelling requirements were in many cases less onerous than mandatory requirements. Some delegations said that problems might arise in certain cases because, while in theory it might be voluntary to use a label, in practice it was mandatory to do so to overcome consumer resistance or meet consumer tastes.¹⁷⁰

Some delegations emphasized that the motivations behind these requirements could be very different. Some delegations said that if labelling was required the motive was to exercise control of some sort. Some delegations said that in some cases the motivations was consumer information while in others it was consumer protection (health and safety). Some delegations pointed out that in some cases labelling requirements facilitate trade. Some delegations said that in some other cases the unspoken or unconscious motivation could be to restrict trade. Many delegations point out however that in practice it would be difficult to identify motivations; it was the trade effect of labelling requirements that was important in the present context and the Group should concentrate on these. Some delegations said that differences in labelling requirements, both regarding the information required and the way in which it was presented, could create obstacles to trade. Some delegations said that problems might arise because different requirements were applied, in clear violation of Article III, to imported and domestically produced goods but that the more usual case was one in which barriers to trade were created even though imports were subject to the same requirements as domestically produced goods so that even though national treatment was granted the purpose of Article III:4 was defeated.¹⁷¹

Some delegations from developing countries said that labelling rules created more acute problems for their countries than for others. It was more difficult for them both to find out what the rules were and to follow them. Some delegations from developing countries expressed particular concern about the trade obstructive effects of complicated regulations.

¹⁶⁹ MTN/3B/12, para. 4.

¹⁷⁰ MTN/3B/12, para. 5.

¹⁷¹ MTN/3B/12, para. 6.

Some delegations from developing countries pointed to difficulties created by the diversity of requirements in different export markets. Some delegations from developing countries said that it was difficult for them to follow certain requirements because the technology on which their export products were based was different from that used in importing countries and no allowance for this was made in the regulations.¹⁷²

The secretariat noted that labels can be of different types. In current usage a label means a piece of paper; card, linen, metal etc. which is attached to a product and carries some information about it. In the present context the fact that the label is detachable does not seem an essential feature and labelling has been taken to include marking by which information is applied directly to the product. Information can be conveyed in different ways – by writing, by symbols and in some cases by colour coding (e.g. of electric wiring). The information conveyed by labels or marking can also be of many different types. It can give e.g. the name of the product, the name of the manufacturer, factual details of the product's composition or information about the product's performance. Labels or marks can also have very specialized purposes. They can show the country of origin of products. There is a difference of opinion in the Group as to whether problems relating to marks of origin are covered by the proposed Code's terms of reference. They can be registered trademarks. They can show that a product conforms to a certain standard.¹⁷³

4.3.3.4 Applicability of the Code to packaging

Some delegations pointed out that there were different types of requirements in this area. These dealt with material to be used with a view to its effect on the contents and the range of package sizes permitted. These might both have implications for international trade.¹⁷⁴ Some delegations said that there were also requirements relating to the standard of fill; these could take the form either of average requirements or minimum requirements.¹⁷⁵ Some delegations from developing countries mentioned the problem of the additional cost of certain kind of

¹⁷² MTN/3B/12, para. 8.

¹⁷³ MTN/3B/17, para. 4.

¹⁷⁴ MTN/3B/12, para. 9.

¹⁷⁵ MTN/3B/12, para. 10.

packaging.¹⁷⁶

The secretariat noted that packages serve different purposes. Goods are packed in commercial packages in the quantities required by direct consumers. These packages are usually designed to prevent damage to the contents. They are sometimes designed to prevent the contents from damaging other things, or to increase the consumer appeal of the product. Packages are made from different materials and take different forms – a pipeline is a package. Goods are also packaged to make up standardized lots which can be conveniently handled and transported. These packages were originally designed to be lifted by hand but more recently have also been designed for mechanical handling, e.g. by palettization and containerization.¹⁷⁷

A package is material in which the commodity is wrapped, or filled. Packages serve different purposes. Goods are packed in commercial packages in quantities required by direct consumers; such packages are usually designed to prevent damage to the contents or to increase the consumer appeal for the product. Goods are also packed in containers for transporting them to their place of use; the containers protect not only the commodity itself but also the other goods, the transportation facilities and the personnel handling the containers.¹⁷⁸

Labels also can be of different types. They generally provide written information to the customer on the commodity, its composition, mode of use and occasionally, its price. Labels may also have marks indicating the country of origin of products. Marks of origin may also have marks indicating the country of origin of products. Marks of origin¹⁾ may also be shown by embossing or engraving on containers or this. Footnote ¹⁾ there was a difference of opinion in Group 3(b) as to whether problems in the field of marks of origin were covered by its terms of reference. The Trade Negotiation Committee has, at its meeting in July 1974, decided that the problems in this field “should be taken up in the context of non-tariff measures at an appropriate time, but without delay in the course of the negotiations”.¹⁷⁹

Requirements in the field of packaging and labelling may be mandatory or voluntary. For example, in the case of some products, it is mandatory to label a product. The mandatory

¹⁷⁶ MTN/3B/12, para. 11.

¹⁷⁷ MTN/3B/17, para. 3.

¹⁷⁸ MTN/3B/23, para. 35.

¹⁷⁹ MTN/3B/23, para. 36.

obligation may be of two types; it may be obligatory to show certain information on the label; it may be obligatory to present information in a certain way. In other cases it may not be mandatory to label a product, but if labels are used they are required to conform to certain requirements (conditional labelling); in some other cases labelling may be purely voluntary inasmuch as it is not required under any regulation.¹⁸⁰

4.3.3.5 Applicability of the Code to marks of origin

The Work Group noted that there was GATT Article IX regulating Marks of origin. If problems caused by marks of origin are considered and dealt with under the Code, then it would be necessary to clarify and prevent that relevant provision in the Code and GATT Article IX do not conflict with each other. On the basis, the Work Group reviewed Article IX.

The Work Group noted that Article IX reaffirms the principle of the MFN clause in respect of marks of origin and that “laws and regulations relating to marks of origin should be reduced to a minimum so as not to hamper international trade”. The Article further states that in order to reduce the difficulties and inconvenience which such measures may cause to the commerce and industry of the exporting countries, each contracting party should as far as possible, permit required marks of origin to be fixed at the time of importation, should settle amicably any disputes that might arise and should “accord full and sympathetic consideration to such requests or representations as may be made by any other contracting party”. In addition to these provisions, the CONTRACTING PARTIES, at their thirteenth session, adopted a Recommendation on the subject. This recommendation calls upon the countries “to scrutinize carefully their existing laws and regulations, with a view to reducing as far as possible, the number of cases in which marks of origin are required”; it further suggest the use of standard wordings, cases where requirements should be exempted and states that penalties should not be imposed for failure to comply with marking requirements prior to importation, except in cases of fraudulent intent.¹⁸¹

¹⁸⁰ MTN/3B/23, para. 37.

¹⁸¹ MTN/3B/23, para. 39.

4.3.4 Concepts and definitions of “standards” in the early negotiations

When the Tokyo Round negotiations began, the Working Group found that the concept of standards and their conformity assessment procedures are complex and diverse. Particularly in terms of their legal status and establishing entities, standards varied substantially. Therefore, some standards had legal basis while the others had not; and some were prepared, adopted or applied by a standardization body of the central government while the others were formulated and applied by a standardization body of the local government or non-government entities. Also, standardizing bodies were domestic, regional or international.

Nevertheless, the Working Group seemed to have been certain that mandatory standards and their relevant works of central government bodies be directly regulated by the proposed code whereas, standards by local or non-government bodies be indirectly regulated by the code. A direct obligation means that central government bodies were obliged to carry out obligations in the proposed code and ensure that central government standardizing bodies comply with provisions of the Code. On the contrary, an indirect obligation means that the central government bodies would generally “use all reasonable means within their power” to ensure that subsidiary bodies act in compliance with the provisions of the code.

Although such distinction is made, the content of the obligation stipulated in the proposed code was almost identical; a significant difference is the degree or level of compliance. However, the Working Group agreed to make it clear that government signatories should accomplish compliance and be responsible for other standard bodies’ implementation of the proposed Code. Thus, the Work Group agreed to say, “[i]t may be noted however that in default of compliance by subsidiary bodies with the code, a residual obligation is sometimes placed on government signatories to carry out the relevant provisions of the code.”¹⁸²

4.3.4.1 Concepts of “standard” in the early negotiations

The Work Group in the beginning of the Tokyo Round recognized the concept of standard

¹⁸² MTN/3E/W/11, para 7.

as defined in the 1973 Proposed Code, which described, “...any specification which lays down some or all of the properties of a product in terms of quality, purity, nutritional value, performance, dimensions and other characteristics.”

Then, the Group not only considered effect of standards as a trade barrier but their valuable aspects to industries. The Group briefly discussed some beneficial impacts of standards as they help permit mass production, avoid resource waste, and better control inventories.¹⁸³ In addition, the Group agreed that some are used to lay down minimum public health and safety conditions. On the other hand, the Group noted a considerable impact of standards on international trade. It noted there may be situations where countries misunderstand and dispute over performance, testing and inspection or cases in which standards or standards related procedure act like trade barriers.¹⁸⁴

Although the sources of trade barriers and problems may be divergent, a root cause for them was considered to be related with the domestic standardization process which often failed to take into account the practices and manufacturing processes used in other countries. Therefore, the Group noted that trade problems of standards arose regardless of whether certain standards were mandatory or voluntary. Thus, in its note to the Secretariat in December 1974, the Group reported,

“... Such standards, particularly if they were mandatory, posed problems to exporters as there was an obligation to comply with the specifications laid down. A foreign manufacturer was thus able to sell his product only if he adapted his production process to the requirements prescribed by different importing countries. Though there was no such obligation to comply in the case of voluntary standards, these may in practice pose problems similar to mandatory standards. This may be relevant in cases where there were wide differences between standards adopted by different countries and buyers such as governmental agencies and manufacturing associations who required that products which they purchased should

¹⁸³ MTN/3B/23, para 9.

¹⁸⁴ MTN/3B/23, para. 10.

conform to particular national standards.”¹⁸⁵

Then, the Group further noted those conformity assessment procedures, if they were unnecessarily rigorous or where they did not accept results of tests and inspections carried out in the exporting country, could also be another source of trade problems. It reviewed some relevant notifications in the inventory which indicated such restrictive effects of conformity assessment procedures could vary from increased expenses and delays to practical impossibility for an exporter to market his product due to difficulties in obtaining necessary approvals.

4.3.4.2 Terminologies and definitions in the draft *Standards Codes* and the ECE/ISO definitions

As the TBT negotiation was proceeding, the definitions and terminologies were being established in the Economic Commission for Europe/International Organization for Standardization and there was a question of whether they should be harmonized or adopted into the TBT Code.

Countries of the Sub-Group divided in views over whether it would be appropriate and possible to apply the ECE definitions to the draft Code.¹⁸⁶ Following the disagreement, the Secretariat was asked to prepare a working paper which compared two sets of definitions and implications of the ECE definitions for the draft Code.¹⁸⁷ The working paper found that there was no one to one correspondence between the definitions in the proposed Code and the ECE definitions although majority of the definitions in the proposed Code were equivalent to those in the ECE definitions. It compared terminologies and definitions used in the two sets of text. The comparison table is replicated in <Table 6>.

¹⁸⁵ MTN/3B/23, para. 11.

¹⁸⁶ MTN/NTM/3, para. 6.

¹⁸⁷ MTN/NTM/W/14, para. 3.

Table 6. Comparison of the term “standard” in the draft Standards Codes and in the ECE definitions

GATT terminology		Corresponding ECE terminology	
English	French	English	French
“standard”	“spécification technique”	“technical specification”	“spécification technique”
“mandatory standard”	“réglementation technique”	“technical regulation”	“règlement technique”
“voluntary standard”	“norme”	No definition but term might be: “voluntary technical specification”	No definition but term might be: “spécification technique facultative”
“international standard”	“norme internationale”	“international technical specification”	“règlement technique internationale”
“voluntary standard body”	“organisme de normalization privé”	No definition but term might be: “voluntary standardizing body”	No definition but term might be: “organisme privé à activités normatives”
“International standards body”	“organisme international de normalisation”	“international standardizing body”	“organisme international à activités normatives”
“regional standards body”	“organisme régional de normalization”	“regional standardizing body”	“organisme régional à activités normatives”

Source: Reproduced from the working paper by the Secretariat (MTN/NTM/W/14).

The main differences in the terminology used in the two sets of definitions relate to the terminology of ‘standards’ and ‘quality assurance systems’.¹⁸⁸ The ECE terms which corresponded to the proposed Code’s ‘standard’ in English and ‘spécification technique’ in French, were ‘technical specification’ and ‘spécification technique’ respectively. The working paper noted that the ECE used the term ‘standards’, which was translated into French as ‘norm’, “in a very special, and in some respects a very limited, way.”¹⁸⁹ The working paper analyzed the different use of the terminology ‘standard’ had repercussion in several other terms.

¹⁸⁸ MTN/NTM/W/14, para. 5 and para. 8.

¹⁸⁹ MTN/NTM/W/14, para. 6.

In addition, the working paper noted that the ECE term corresponding to “quality assurance system” in the GATT proposed Code was “certification system” and this difference had repercussion in several other terms.¹⁹⁰ This comparison table is also replicated in <Table 7>.

Table 7. Comparison between the term “quality assurance system” in the draft Standards Codes and the term “certification system” in the ECE definitions

GATT terminology		Corresponding ECE terminology	
English	French	English	French
“quality assurance system”	“système d’assurance de qualité”	“certification system”	“système de certification”
“quality assurance body”	“organisme d’assurance de qualité”	“certification body”	“organisme de certification”
“international quality assurance system”	“système international d’assurance de qualité”	“international certification system”	“système international de certification”
“international quality assurance arrangement”	“arrangement international d’assurance de qualité”	No definition but equivalent might be: “international certification arrangement”	“arrangement international de certification”
“regional quality assurance system”	“système régional d’assurance de qualité”	“regional certification system”	“système régional de certification”
“regional quality assurance arrangement”	“arrangement régional d’assurance de qualité”	No definition but equivalent might be: “regional certification arrangement”	No definition but equivalent might be: “arrangement régional de certification”
“membership in a quality assurance system or arrangement”	“qualité de member d’un système ou d’un arrangement d’assurance de qualité”	No definition but equivalent might be: “membership in a certification system or arrangement”	No definition but equivalent might be: “qualité de member d’un système ou d’un arrangement de certification”
“participation in a quality assurance system or arrangement”	“participation à un système ou à un arrangement d’assurance de qualité”	No definition but equivalent might be: “participation in a certain system or arrangement”	No definition but equivalent might be: “participation à un système ou à un arrangement de certification”

Source: Reproduced from the working paper by the Secretariat (MTN/NTM/W/14).

¹⁹⁰ MTN/NTM/W/14, para. 7.

First, the definition of ‘standard’ in the proposed Code was significantly different from the definition of ‘standard’ in the ECE definitions. The working paper noted that the GATT definition of “standard” was clearly more limited than the ECE definition of “technical specification”. The evidence for the conclusion was related to the coverage of ‘standard’, which, unlike ‘technical specification’ used in the ECE definition, was a concept with exclusion of company standards, standards relating to services and codes of practice.¹⁹¹

Table 8. “Standard”-related terms in the draft Standards Codes and their corresponding terms and definitions in the ECE definitions¹⁹²

Terms in the GATT Proposed Code	Corresponding terms and definitions in the ECE Definitions
1. “Standards”	<p>2. <u>Technical specification</u> A document which lays down characterisation of a product or a service such as levels of quality, performance, safety, dimensions. It may include terminology, symbols, testing and test methods, packaging, marking or labeling requirements. A technical specification may also take the form of a code of practice.</p> <p>3. <u>Standard</u> A technical specification or other document available to the public, drawn up with the co-operation and consensus or general approval of all interests affected by it based on the consolidated results of science, technology and experience, aimed at the promotion of optimum community benefits and approved by a body recognized on the national, regional or international level.</p> <p>Note 1: A technical specification which does satisfy all the conditions given in the definition may sometimes be called by other names, for example, “recommendation”.</p> <p>Note2: In some languages the word “standard” is often used with another meaning than in this definition, and in such cases it may refer to a technical specification which does not satisfy all the conditions given in the definition, for example, “company standard”.</p>
2. “Mandatory standard”	<p>4. <u>Technical regulation</u> A regulation containing or referring to a standard or a technical specification.</p> <p>Note: A technical regulation may be supplemented by technical guidance</p>

¹⁹¹ MTN/NTM/W/14, para. 9.

¹⁹² MTN/NTM/W/14, Annex-Comparison of GATT and ECE Definitions, p. 5-10.

	<p>which outlines some way(s) to fulfil the regulation.</p> <p>1. <u>Regulation</u> A binding document which contains legislative, regulatory or administrative rules and which is adopted and published by an authority legally vested with the necessary power.</p> <p>6. <u>Mandatory standard</u> A standard of which the application has been made mandatory by a regulation</p>
3. "voluntary standard"	No corresponding definition
4. "international standard"	<p>No definition of "international technical specification"</p> <p>18. <u>International standard</u> A standard adopted by an international standards organization or in certain cases a technical specification adopted by an international standardizing body.</p>
5. "Central government body"	No corresponding definition
6. "Local government body"	No corresponding definition
7. "Regulatory body"	No corresponding definition
8. "Voluntary standards body"	No corresponding definition
9. "National standards body"	<p>11. <u>National standards body</u> A nationally recognized body whose principal function at the national level by virtue of its statutes or the law of the country, in the preparation and/or publication of national standards and/or approval of standards prepared by other bodies. This body is eligible to be the national member of the corresponding international and regional standards organization.</p>
14. "Harmonized standards"	<p>No definition of Harmonized Technical Specifications</p> <p>5. <u>Harmonized standards</u> Standards of the same scope that have been approved by different standardizing bodies and which are either technically identical or recognized as technically equivalent in practice. Note: Harmonization of standards is generally carried out in order to prevent or eliminate technical barriers to trade in the region of the world in which they are applied.</p>

Second, the GATT Proposed Code consistently used the term 'quality assurance system' and the corresponding term used in the ECE definitions was 'certification system'. The working paper could not conclude whether the difference between the proposed Code's

definition of ‘quality assurance system’ and the corresponding ECE definition ‘certification system’ were significant. It considered that the ECE definition covered the only two methods that were in fact used to indicate conformity with certain standards, namely, certificates and marks. On the other hand, the general formulation such as that used in the Code may be preferable because it would cover any other possible methods which might be used in the future.¹⁹³

Table 9. “Quality assurance system”-related terms in the draft Standards Codes and their corresponding terms and definitions in the ECE definitions¹⁹⁴

Terms of the GATT Proposed Code	Corresponding terms and definitions in the ECE Definitions
12. “Determination of ‘conformity’ with standards”	20. <u>Conformity with standards or technical specifications</u> The conformity of a product or a service with all the requirements of specific standards or technical specifications.
13. “Administrative procedures”	21. <u>Administrative procedures for determining conformity</u> The administrative measures needed to determine whether or not a product or a service is in conformity with specific standards or technical specifications. It may include administrative arrangements for controlling the frequency and location of testing, for carrying out tests and for supervising the control of quality by producers.
15. “Quality assurance body”	<u>Certification body</u> . A governmental body, or other independent and impartial body meeting the needs of all parties interested in the function of the certification system, possessing the necessary competence and reliability to operate a certification system.
16. “Quality assurance system”	25. <u>Certification system</u> A system having its own rules of procedure and management, for carrying out conformity certification. 24. <u>Conformity certification</u> The action of certification by means of a certificate of conformity or mark of conformity that a product or service is in conformity with specific standards or technical specifications. 22. <u>Certificate of conformity</u> A document attesting that a product or a service is in conformity with specific standards or technical specifications. 23. <u>Mark of conformity</u> A mark attesting that a product or a service is in conformity with specific standards or technical specifications.
17. “International quality	27. International certification system

¹⁹³ MTN/NTM/W/14, para. 10.

¹⁹⁴ MTN/NTM/W/14, Annex-Comparison of GATT and ECE Definitions, p. 5-10.

assurance system” 18. International quality assurance arrangement”	Certification system organized and managed by a governmental or non-governmental international organization whose membership is open to all countries of the world. 28. Regional certification system Certification system organized and managed by a governmental or non-governmental regional organization whose membership is usually limited to certain countries from a given region of the world.
19. “Regional quality assurance system” 20. “Regional quality assurance arrangement”	No corresponding definition
21. “Membership in a quality assurance system or arrangement” 22. “Participation in a quality assurance system or arrangement”	No corresponding definition

Having found stark differences, the sub-Group basically came to consider one of the two alternatives at the end; one option was to adopt only the terminologies used in the ECE definitions, which was expected to make little change in the burden of the Code’s obligations; and the other was to use both terminologies and definitions of the ECE list, which would entail some modifications of the coverage of the proposed Code.¹⁹⁵

4.3.4.3 Draft *Standards Codes*’ harmonization with the ECE/ISO definitions

As to the terminology, the Sub-Group reached an agreement to use the ECE/ISO terms. However, some of the ECE/ISO definitions did not meet the special needs of the Draft Code. A Finland’s note particularly viewed three main problems connected with the application of the ECE/ISO definitions for the Draft Code.¹⁹⁶

The first problem it noted was that the ECE/ISO definitions were intended for general application whereas the GATT needed definitions for a specified use. Thus, in some cases the scope of the ECE/ISO definition was wider than what was agreed for the coverage of the Draft Code. The Finland’ report noted the definition of “technical specification” as a typical

¹⁹⁵ MTN/NTM/W/14, para. 4.

¹⁹⁶ MTN/NTM/W/35.

example.¹⁹⁷ Since it was unlikely that the ECE/ISO definitions were amended to meet the specific needs of the Draft GATT Code, much easier way of resolving the problem was simply to add not limiting the scope of a definition.¹⁹⁸

The second problem the Finland's report found was caused by the different approach to the definitions. In contrast to a normative purpose of establishing definitions by the ECE, the fundamental purpose of the GATT definition was to give the coverage of the Code. Since the normative provisions were then included in the Operation Provisions and, therefore, some ECE/ISO definitions became too narrow for the purposes of the Draft Code. The report considered the definitions of "standard" and "certification body" as representative examples.

¹⁹⁹ The report thought that this problem is more difficult to solve by adding note. Instead, it suggested sending requests to the ECE and the ISO for consideration.²⁰⁰

The third problem was relevant to the appropriate definition for 'standard' in the Draft Code since the desired coverage of Draft Code had not yet been agreed. The Finland's report noted that most delegation considered a coverage given by the Draft Code would be too wide whereas a coverage given by the ECE/ISO definitions would be too narrow.²⁰¹ The report made some proposals regarding the matter. For instance, it suggested deleting the words "and publishing" in the ISO/ECE definition of 'regulation' but it also concluded that this suggestion was hardly significant because in practice all regulations of importance for international trade were anyway published.²⁰² Another suggestion was made as regards to the definition of 'technical specification'. In terms of the coverage, the definition of the ECE/ISO text was too broad, so the report suggested excluding those specifications which deal with services, those which have the form of a code or practice or those which were prepared for use by a single enterprise, whether governmental or non-governmental either for its own production or purchasing purpose. Also, it emphasized the need of a note dealing with process only if and when the Code was to cover also agricultural products.²⁰³ The last comment was on the definition of 'standard'. The paper found the scope of the ECE/ISO

¹⁹⁷ MTN/NTM/W/35, para. 3.

¹⁹⁸ MTN/NTM/W/35, para. 4.

¹⁹⁹ MTN/NTM/W/35, para. 3.

²⁰⁰ MTN/NTM/W/35, para. 4.

²⁰¹ MTN/NTM/W/35, para. 3..

²⁰² MTN/NTM/W/35, para. 5.

²⁰³ MTN/NTM/W/35, para. 5.

definition partly too wide, partly too narrow for the purposes of the Code. Since it would hardly be a case that the ECE and the ISO would make any amendment to their definitions, the report suggested to give a new definition for the term.²⁰⁴

In meetings of early 1976, the Sub-Group examined the specific drafting suggestions made by delegations regarding the Proposed Code. The Subgroup also examined the applicability of the ECE/ISO definitions to the Proposed Code. The Sub-Group agreed that the ECE/ISO terms could be used in the Proposed Code, but noted that some delegations preferred the terms “standard” to “technical specification”, “voluntary standard” to “standard” and “mandatory standard” to “technical regulation”.²⁰⁵ In addition, countries suggested some modifications to the ECE/ISO definition, which was later termed to be ‘Hypothesis A’. For instance, the US wanted the definitions of ‘technical specifications’ to include product-related processes and production method while Canada suggested to clarify the exclusion of patents, copyrights, trademarks, certification marks and registered industrial designs from the scope of ‘technical specification’.²⁰⁶

Regarding the definition of ‘standard’, the US, and the EEC suggested to clearly exclude company standards and standards prepared by a single enterprises, whether governmental or non-governmental either for its own production or purchasing for its own consumption.²⁰⁷ Also, the Sub-Group agreed to insert that for “standard”, the word “body” covers also a national standardizing system.²⁰⁸ Besides, there were suggestions to clarify the meaning of the words ‘recognized body’. Japan suggested to clarify and insert that standards are to be “approved by a body, either central government body, local governmental body, regulatory body, a body other than a central or local governmental body, a non-governmental organization or any other standardizing body, for continued application and with which there is no legal obligation to comply.”²⁰⁹

In respect of ‘technical regulations’, the sub-Group suggested to insert a sentence “For the purposes of the Code this definition covers also a standard of which the application has been

²⁰⁴ MTN/NTM/W/35, para. 5.

²⁰⁵ MTN/NTM/12.

²⁰⁶ MTN/NTM/W/37, p. 2.

²⁰⁷ MTN/NTM/W/37, p. 2.

²⁰⁸ MTN/NTM/W/37, p. 2.

²⁰⁹ MTN/NTM/W/50, p. 2.

made mandatory not by separate regulation but in virtue of a general law.²¹⁰ The Sub-Group also examined the question as to whether the term should also cover technical regulations which cite standards or technical specifications for illustrative purposes, in a descriptive or informative way.²¹¹

Therefore, the Sub-Group agreed that, in many cases, the detailed wording of the ECE/ISO definitions could be applied to the Code. However, it agreed that in a number of cases the ECE/ISO definitions would need to be modified for the purpose of the Code. It drew attention to two alternatives of harmonizing the proposed Code with the ECE/ISO definitions: hypothesis A and hypothesis B. Hypothesis A was to use the ECE/ISO definitions without any modifications as such and any qualification for the purpose of the Code should be achieved through separate notes. Hypothesis B was to achieve any qualification of the definitions through modification of definitions.

In the subsequent meetings in late 1976, the Sub-Group discussed which versions of definitions to adopt. Particularly, it noted any differences between Hypothesis B definitions and the ECE/ISO definitions with a view to avoid significant deviation of the proposed Code from the internationally agreed definitions. For the purpose, the Finland's report played important role in examining and ensuring the harmonization.²¹² The report came to the conclusion that only a few words needed definitions for the purpose of the Code: regulation, technical specification, standard, technical regulation, international body or system, regional body or system, central government body, local government body, certification body, membership in a certain system and participation in a certification system.²¹³ The report suggested that the other terms in the ECE/ISO definitions could then be deleted from the list of the definitions in the proposed Code.²¹⁴

In addition, the report found that there were two main reasons for the differences between the Hypothesis B definition and the ECE/ISO definitions.²¹⁵ They differed in terms of coverage. The ECE/ISO definitions were made for general application whereas the

²¹⁰ MTN/NTM/W/37, p. 17.

²¹¹ MTN/NTM/W/50, p. 3.

²¹² MTN/NTM/W/70.

²¹³ MTN/NTM/W/70, para. 5.

²¹⁴ MTN/NTM/W/70, para. 6.

²¹⁵ MTN/NTM/W/70, Annex 2, pp. 6-7.

Hypothesis B definitions to meet the specific needs of the Code concerning its coverage. Another main reason for the difference was their normative characteristics. Thus, some of the ECE/ISO definitions included normative elements; for the purposes of the Code, it was preferable to leave such elements out from the operative provisions of the Code.

In meetings of November 1976, the Sub-Group met and invited the Secretary-General of UNCTAD or his representative as an observer, Central Secretariat of the International Organization for Standardization (ISO) and the Central Office its sister organization the International Electrotechnical Commission (IEC) to attend the session of the Sub-Group in an expert capacity.²¹⁶ In those meetings, the Sub-Group had a detailed discussion of the proposals relating to the Operative Provisions of the Draft Standard Code, including proposals to deal with problems of developing countries. The Sub-Group also discussed over the questions relating to the terms to be used in the Draft Standards Code, based on a suggestion made by the Finland report.²¹⁷ At the meeting of the November 1976, the Sub-Group requested Mr. K. Bergholm from Finland to prepare a further paper on the terms which need to be defined for the purposes of the Draft Code and on the differences between the Hypothesis B and the ISO/ECE definitions.

Accordingly, Mr. Bergholm from Finland continued his work on definition.²¹⁸ In his subsequent report, he explained that, on one hand, it was obvious that creating an own set of definitions for standardization and certification by GATT in conflict with those prepared by ECE and ISO could lead to confusion and misunderstandings. But, on the other hand, it was also considered to be equally obvious that some of the definitions prepared by ECE and ISO for general application would not meet the specific need of the Draft Code. To solve this problem by adding footnotes to the ECE/ISO definitions had turned out to be cumbersome, and it was hard to avoid all ambiguities by this method.²¹⁹

Thus, he came to a conclusion that the best way was to base the presentation of the definition partly on Hypothesis A and partly on Hypothesis B. He proposed that, in the Code, general terms for standardization and certification should normally have the meaning

²¹⁶ MTN/NTM/25, paras. 1-3.

²¹⁷ MTN/NTM/25, para. 6.

²¹⁸ MTN/NTM/W/86.

²¹⁹ MTN/NTM/W/86, para. 1.

given to them by the definitions adopted by the ECE and the ISO taking into account – according to the Vienna Convention on the interpretation of treaties – their context and in the light of the object and the purpose of the Code. At the same time, to meet the specific needs of the Code, those terms which were essential for the coverage of the Code or for the obligations of the adherents and where the meaning of the term was not unambiguous should be specifically defined.²²⁰

As a result, he prepared new draft texts for Section I as well as Annex 1 of the Draft Code also indicating the differences between the definitions for the specific purposes of the Code and the corresponding ECE/ISO definitions when such existed.²²¹ All definitions of Annex 1 had been revised in order to avoid any remaining ambiguities and to harmonize the wordings in different definitions. Almost all amendments suggested by the Finland report were adopted by the Draft Code of 1977 and left unchanged throughout the remaining Tokyo Round negotiations.

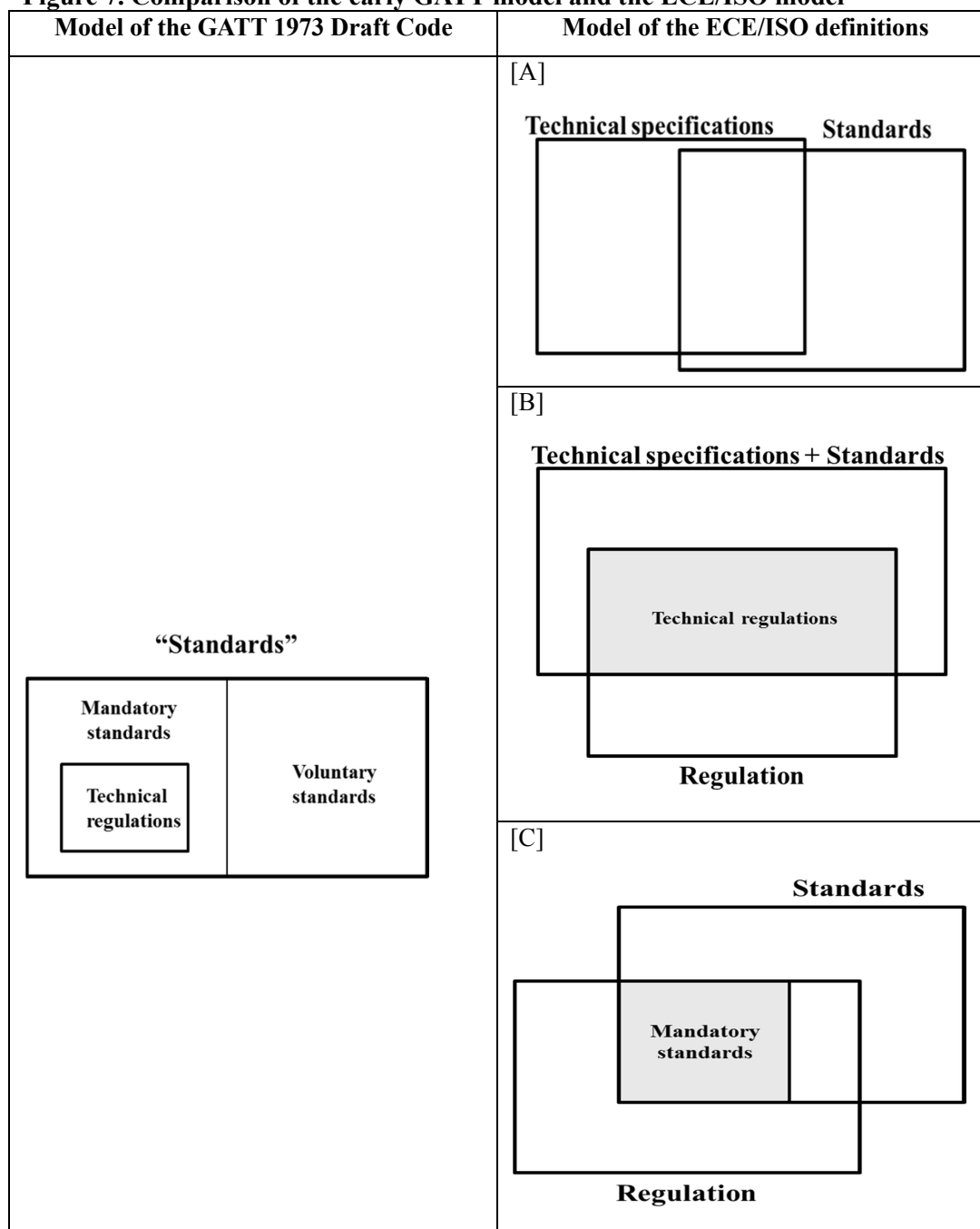
4.3.4.4 Definitions in the 1973 Draft *Standard Code* and the ISO/ECE definitions

In the ECE/ISO definitions, the concept of “technical specification” and the concept of “standard” together represent the corresponding concept of “standard” in the GATT Draft Code. They constitute the largest categories and contain an overlapping scope with each other. In specific, the term “technical specification” is defined in a broad sense as “a document which lays down characterization of a product or a service such as levels of quality, performance, safety, dimensions. It may include terminology, symbols, testing and test methods, packaging, marking or labeling requirements. A technical specification may also take the form of a code of practice.” The “standard” in the ECE/ISO context can be a technical specification or other document which has some special features like its availability to the public, its basis on cooperation and consensus, or general approval of all interests affected by it as well as its goal to promote optimum community benefits and approval by a recognized body.

²²⁰ MTN/NTM/W/86, para. 2.

²²¹ MTN/NTM/W/86, para. 3.

Figure 7. Comparison of the early GATT model and the ECE/ISO model



Source: Author's analysis

The 1973 Draft Code in the GATT regime use the term “standards” share indicate “any specification which lays down some or all the properties of a product...” but the scope of the term excludes service standards and company standards. In general, the GATT term share many common aspects with the ECE/ISO term.

The Draft Code’s term “standards” are divided into the categories “mandatory standards” and “voluntary standards” depending on their compliance and “mandatory standards” are to embrace “what would be normally described as technical regulation.” Thus, the scopes and relations between “standards”, “mandatory standards”, “technical regulations” and “voluntary standards” can be drawn as in < Figure 7>.

There is no corresponding term for “voluntary standards” of the 1973 Draft Code in the ECE/ISO definitions. Only “mandatory standards” and “technical regulations” are defined in the ECE/ISO text.

The ECE/ISO definitions provide the meaning of “regulation” as “[a] binding document which contains legislative, regulatory or administrative rules and which is adopted and published by an authority legally vested with the necessary power”. Based on the definition, the term “technical regulation” is defined as “[a] regulation containing or referring to a standard or a technical specification” and, thus, its concept is built on the definitions of “technical specifications”, “standards” and “regulation”.

The term “mandatory standard” in the ECE/ISO context is defined as “[a] standard of which the application has been made mandatory by a regulation”. Several aspects are noteworthy. In the ECE/ISO context, the meaning of “mandatory standard” is based on only the concept “standard” which is separately defined from the term “technical specification”. However, in the 1973 Draft Code, the term “standard” shares, in a large part, common elements with the ECE/ISO’s “technical specification”. Another point is related to the concept “mandatory”. In both contexts, definitions imply that “mandatory” character is made by some authorities and is based on legal power; the 1973 Draft Code requires “an action of an authority endowed with the necessary legal power” and the ECE/ISO mentions “regulation”. Last, according to the normative definitions of the ECE/ISO, “mandatory standard” is different from “technical regulation” in that the former requires application of the standard to be mandatory while the latter provides that standards or technical specifications are contained or referred to in a regulation which is a binding document. A regulation is a

binding document, but the application of standards or technical specifications addressed by the regulation may or may not be obligatory.

Similarly, in the 1973 Draft Code, definitions of “mandatory standards” and “voluntary standards” are referring to “standard[s]”, stating that “[t]his is a standard with which it is obligatory to comply...” and “[t]his is a standard with which there is no legal obligation to comply” respectively.

Table 10. Draft Standards Codes' major terms and definitions considered for harmonization with the ECE/ISO definitions

ECE/ISO Definitions ²²²	[Option 1] Hypothesis A ²²³	[Option 2] Hypothesis B ²²⁴	May 1977 Draft Code (MTN/NTM/W/94) ²²⁵
<p><u>Technical specification</u> A document which lays down characterisation of a product or a service such as levels of quality, performance, safety, dimensions. It may include terminology, symbols, testing and test methods, packaging, marking or labeling requirements. A technical specification may also take the form of a code of practice.</p>	<p><u>Technical specification</u> A document which lay down characteristics of a product or a service such as levels of quality, performance, safety, dimensions. It may include or deal exclusively with terminology, symbols, testing and test methods, packaging, marking or labeling requirements. A technical specification may also take the form of a code of practice.</p> <p><u>Additional note:</u> For the purposes of this Code such technical specifications are excluded which deal with services [or have the form of a code or practice.]</p>	<p><u>Technical specification</u> A document which lay down characteristics of a product such as levels of quality, performance, safety, dimensions. It may include or deal exclusively with terminology, symbols, testing and test methods, packaging, marking or labeling requirements.</p>	<p><u>Technical specification</u> A specification contained in a document which lays down characteristics of a product such as levels of quality, performance, safety or dimensions. It may include, or deal exclusively with terminology, symbols, testing and test methods, packaging, marking or labeling requirements as they apply to a product.</p> <p><u>Explanatory note:</u> The Code deals only with technical specifications relating to products. Thus the wording of the corresponding ECE/ISO definition is amended in order to exclude services and codes of practice.</p>

²²² MTN/NTM/W/14, Annex-Comparison of GATT and ECE Definitions, p. 5-10.

²²³ Hypothesis A is that the ECE/ISO definitions would be used without any modifications as such and that any qualification of these definitions which was required for the purpose of the Code should be achieved through separate notes to this effect. MTN/NTM/W/38.

²²⁴ Hypothesis B is that there were any qualification of the definitions was required for the purpose of the Code, this should be achieved by modifying the definitions themselves. MTN/NTM/W/38.

²²⁵ MTN/NTM/W/94, pp. 31-33.

<p><u>Standard</u> A technical specification or other document available to the public, drawn up with the co-operation and consensus or general approval of all interests affected by it based on the consolidated results of science, technology and experience, aimed at the promotion of optimum community benefits and approved by a body recognized on the national, regional or international level.</p> <p>Note 1: A technical specification which does satisfy all the conditions given in the definition may sometimes be called by other names, for example, “recommendation”.</p> <p>Note2: In some languages the word “standard” is often used with another meaning than in this definition, and in such cases it may refer to a technical specification which does not satisfy all the conditions given in the definition, for example, “company standard”</p>			
---	--	--	--

<p><u>Technical regulation</u> A regulation containing or referring to a standard or a technical specification.</p> <p>Note: A technical regulation may be supplemented by technical guidance which outlines some way(s) to fulfil the regulation.</p> <p><u>Regulation</u> A binding document which contains legislative, regulatory or administrative rules and which is adopted and published by an authority legally vested with the necessary power.</p> <p><u>Mandatory standard</u> A standard of which the application has been made</p>	<p><u>Technical Regulation</u> A regulation containing or referring to a standard or a technical specification.</p> <p><u>ECE note:</u> A technical regulation may be supplemented by technical guidance which outlines some way(s) to fulfill the regulation.</p> <p><u>Additional note:</u> For the purposes of this Code a technical regulation is a regulation or those parts of a regulation containing or referring to a standard or other technical specifications.</p> <p><u>Regulation</u> A document which contains binding legislative, regulatory or administrative rules and which is adopted by an authority legally vested with the necessary power and publish.</p> <p><u>Additional note:</u> For the purpose of this Code the words “and published” shall be deleted.</p>	<p><u>Technical Regulation</u> A regulation or those parts of a regulation containing or referring to a standard or other technical specification.</p> <p><u>Regulation</u> A document which contains binding legislative, regulatory or administrative rules and which is adopted by an authority legally vested with the necessary power.</p>	<p><u>Technical regulation</u> A technical specification, including the applicable administrative provisions, with which compliance is mandatory.</p> <p><u>Explanatory note:</u> The wording differs from the corresponding ECE/ISO definition because the latter is based on the definition of regulation which is not defined in this code. Furthermore the ECE/ISO definition contains a normative element which is included in the operative provisions of the Code.</p>
--	---	---	---

mandatory by a regulation			
(No corresponding definition)	<p><u>Standard</u> A technical specification or other document available to the public, drawn up with the cooperation and consensus or general approval of all interests affected by it, based on the consolidated results of science, technology and experience, aimed at the promotion of optimum community benefits and approved by a body recognized on the national, regional or international level.</p> <p><u>ECE notes:</u> (1) A technical specification which does satisfy all the conditions given in the definition may sometimes be called by other names, for example: “recommendation”. (2) In some languages the word “standard” is often used with another meaning than in this definition, and in such cases it may refer to a technical specification which does not satisfy all the conditions given in the definition, for example: “company standard”. <u>Additional note:</u> (1) For the purposes of this Code the standard covers any technical</p>	<p><u>Standard</u> Any technical specification approved by a recognized body for continued application and with which there is no legal obligation to comply.</p>	<p><u>Standard</u> A technical specification approved by a recognized standardizing body for repeated or continuous application, with which compliance is not made mandatory.</p> <p><u>Explanatory note:</u> The corresponding ECE/ISO definition contains several normative elements which are not included in the above definition. Accordingly, technical specifications which are not based on consensus are covered by the Code. <i>[This definition does not cover technical specification prepared by an individual company for its own production or consumption requirement. (added in the 1978 October Draft)]</i></p>

	<p>specification approved by a recognized body for continued application.</p> <p>(2) For the purposes of this Code the word “or other document” shall be deleted.</p>		
(No corresponding definition)	<p><u>Central government body</u> Central government, its ministries and departments or any body subject to the control of the central government in respect of the activity in question. In the case of the European Economic Community the provisions governing central government bodies [would] apply.</p> <p>Note: If the EEC were to sign to the Code, the word “would” and the square brackets would disappear.</p>	<p><u>Central government body</u> Central government, its ministries and departments or any body subject to the control of the central government in respect of the activity in question. In the case of the European Economic Community the provisions governing central government bodies [would] apply.</p> <p><u>Explanatory note:</u> If the EEC were to sign the Code, the word “would” and the square brackets would disappear.</p>	
(No corresponding definition)	<p><u>Local government body</u> Government body which is not subject to the control of the central government in respect of the activity in question, such as: (i) the authorities of States, Provinces, Lander, Cantons, etc. in the case of a federal or decentralized system, and (ii) local government authorities.</p>	<p><u>Local government body</u> Government body which is not subject to the control of the central government in respect of the activity in question, such as: (i) the authorities of States, Provinces, Lander, Cantons, etc. in the case of a federal or</p>	

		decentralized system, and (ii) local government authorities.
(No corresponding definition)	<u>Regulatory body</u> Central or local government body or any other body which has legal power to enforce a technical regulation. This may or may not be the same body which prepared or adopted the technical regulation.	<u>Regulatory body</u> A governmental or non-governmental body which has legal power to enforce a technical regulation. This may or may not be the same body which prepared or adopted the technical regulation
<u>Standardizing body</u> A body, governmental or non-governmental, one of whose recognized activities is in the field of standardization.	<u>Standardizing body</u> A body, governmental or non-governmental, one of whose recognized activities is in the field of standardization.	<u>Standardizing body</u> A governmental or non-governmental body, one of whose recognized activities is in the field of standardization.

<u>National standards body</u> A nationally recognized body whose principal function at the national level by virtue of its statutes or the law of the country, in the preparation and/or publication of national standards and/or approval of standards prepared by other bodies. This body is eligible to be the national member of the corresponding international and regional standards organization.	(No corresponding definition)	(No corresponding definition)	(No corresponding definition)
---	-------------------------------	-------------------------------	-------------------------------

4.3.5 Conceptual and rule developments in major draft *Standards Codes*

4.3.5.1 Overview of the major draft *Standards Codes*

During the Tokyo Round, the terminologies and definitions were subject to rigorous discussions from the beginning. In the early period, the ECE/ISO was establishing normative definitions of many terms which were incorporated in the Draft Code and the negotiating countries in the GATT found it necessary to consider the ECE/ISO definitions with a view to minimized confusions and ambiguity when the terms in the Draft TBT Code were actually applied after entry into force. Therefore, the first view years were fully devoted to identifying the discrepancies of terms and definitions between the early Draft Code and the ECE/ISO text and discussing ways to narrowing such discrepancies. Accordingly, some options such as Hypothesis A and Hypothesis B were considered and, for the purpose of the GATT draft, modified definitions from the ECE/ISO definitions were eventually adopted.²²⁶

After the revisions to the definitions in the Annex 1, the negotiators focused on amending disciplines and the regulatory structure. For example, Article 3 was revised so that disciplines for technical regulations of local government bodies and regulatory bodies were clearly provided in this separate article.²²⁷ In the revised Article 3, majority of provisions remained the same as Article 2 for technical regulations of central government bodies, but obligations to participate in regional standardization and to make regional standardization bodies to comply with the Draft were exempted. In addition, Article 3 adopted a new set of transparency procedures.

In October 1978, a major change took place with respect to the regulatory structure and disciplines in relation to that regulatory structure. In terms of regulatory structure, it became less meaningful to distinguish technical regulations and standards because both were ruled by the same provisions after the revisions. The regulatory structure was established in such a

²²⁶ Generally see the following documents: MTN/NTM/W/49, MTN/NTM/W/71, MTN/NTM/W/94.

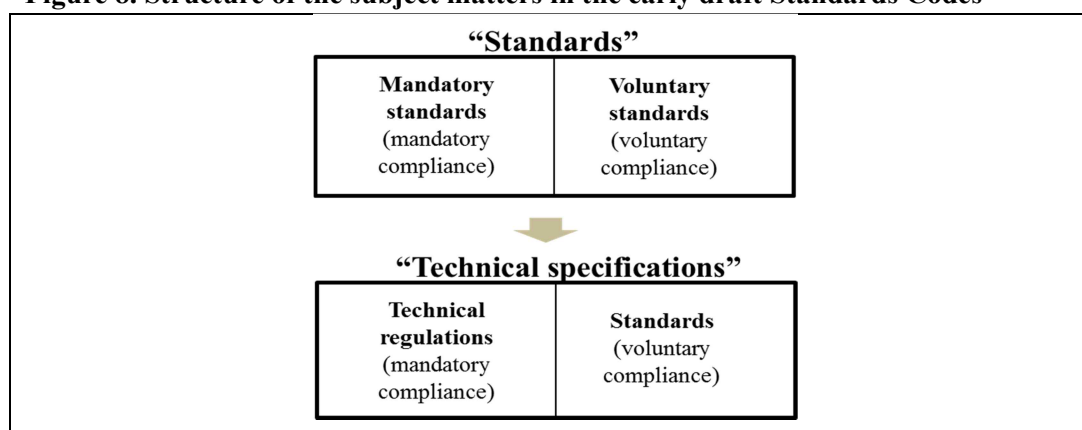
²²⁷ Generally see the following documents: MTN/NTM/W/119, MTN/NTM/W/150.

form that disciplines were no longer differentiated in accordance with types of standards and standardizing bodies but were now distinguished only in terms of the bodies.²²⁸ After these major revisions, the Draft remained unchanged until the finalization of the Tokyo Round negotiations.²²⁹

4.3.5.2 Development of standards definitions in major draft *Standards Codes*

After the Tokyo Round negotiations, several terminologies were replaced. For example, the term “Standards” was replaced by the term “technical specification”; the term “mandatory standards” by the term “technical regulations”; and the term “voluntary standards” by “standards”. See <Figure 8>. Such replacement was largely influenced by the work of harmonization through which confusions and ambiguities resulting from gaps between the GATT draft code and the ECE/ISO text were minimized. The changes in terms and definitions of major concepts are summarized in <Table 11>.

Figure 8. Structure of the subject matters in the early draft Standards Codes



Source: Author’s analysis

²²⁸ Generally see MTN/NTM/W/192.

²²⁹ Generally see the following documents: MTN/NTM/W/192/Rev.1, MTN/NTM/W/192/Rev.2, MTN/NTM/W/192/Rev.3, MTN/NTM/W/192/Rev.4, MTN/NTM/W/192/Rev.5.

Despite the replacement in terminology, the definition and elements of each respective concept remained generally unchanged but it can be inferred that some elements in definitions are influenced by or harmonized with those corresponding in the ECE/ISO context. Thus, the definition of “technical specification” replacing “standard” of the early text remained almost intact, but adopted an explanatory note which explains different scope of the term from that of the ECE/ISO term.

In case of “technical regulation” which replaced the term “mandatory standards”, the element that its compliance be mandatory or “it is obligatory to comply” in the expression of the previous Draft, was still contained. In the previous text, the obligatory compliance was to be made “by virtue of an action by an authority endowed with the necessary legal power” but, in the revised text, such an element relating to the authority was removed. In addition, an explanatory note was inserted to clarify that the meaning of the term in the GATT Draft Code was different from that in the ECE/ISO in that the latter is based on the definition of regulation while the former is not. As a result, the legal characteristics and the role of the authority in making a technical standard became less important element, if not a no element at all, for determining the mandatory aspect of a technical regulation.

The meaning of “standards” which replaced “voluntary standard” of the previous text was perceivably influenced by the ECE/ISO definitions. The element that the compliance with them are “not made mandatory” is still contained but it became ambiguous whether such non-mandatory compliance be found on a legal basis or not. The element relating to the standardizing body was elaborated after the revision; for instance, the technical specification should be “approved by a recognized standardizing body” in order to be a standard. Also, the element based on the phrase “for repeated or continuous application” was inserted. These elements regarding the standardizing body – approval and recognition – and the element of requiring a certain level of frequency were originally provided in the ECE/ISO definition of “standard”.

Overall, it became less explicit that the concept of technical regulation is related to the authority with legal power and that the mandatory compliance be based on a certain legal form. Consequently, it became less evident whether the distinction between technical regulation and standard be made based upon legally binding force or the legal character of the standardizing bodies.

Table 11. Draft Standards Codes' major terms and definitions negotiated during the Tokyo Round

1973 Draft Code (COM.IND/W/108) ²³⁰	May 1977 Draft Code (MTN/NTM/W/94) ²³¹	October 1978 Draft Code (MTN/NTM/W/192) ²³²	Standards Code
<p><u>Standards</u> The term "standard" means any specification which lays down some or all of the properties of a product in terms of quality, purity, nutritional value, performance, dimensions, or other characteristics. It includes, where applicable, test methods, and specifications concerning testing, packaging, marking or labelling to the extent that they affect products rather than processes. It excludes standards which are prepared for use by a single enterprise, whether governmental, semi-governmental or non-governmental, either for its own production or purchasing purposes.</p>	<p><u>Technical specification</u> A specification contained in a document which lays down characteristics of a product such as levels of quality, performance, safety or dimensions. It may include, or deal exclusively with terminology, symbols, testing and test methods, packaging, marking or labeling requirements as they apply to a product.</p> <p><u>Explanatory note:</u> The Code deals only with technical specifications relating to products. Thus the wording of the corresponding ECE/ISO definition is amended in order to exclude services and codes of practice.</p>	<p><u>Technical specification</u> (identical)</p>	<p><u>Technical specification</u> A specification contained in a document which lays down characteristics of a product such as levels of quality, performance, safety or dimensions. It may include, or deal exclusively with terminology, symbols, testing and test methods, packaging, marking or labelling requirements as they apply to a product.</p> <p><u>Explanatory note:</u> This Agreement deals only with technical specifications relating to products. Thus the wording of the corresponding Economic Commission for Europe/International Organization</p>

²³⁰ COM.IND/W/108, p. 4-28.

²³¹ MTN/NTM/W/94, pp. 31-33.

²³² MTN/NTM/W/192, pp. 27-29.

<p><u>Footnote 1:</u> The term “standard” as used in this code has a wider meaning than in customary usage.</p>			for Standardization definition is amended in order to exclude services and codes of practice.
<p><u>Mandatory Standards</u> This is a standard with which it is obligatory to comply by virtue of an action by an authority endowed with the necessary legal power. The term includes the associated administrative provisions.</p> <p><u>Footnote2:</u> The term “mandatory standard” is used to embrace what would normally be described as technical regulation.</p>	<p><u>Technical regulation</u> A technical specification, including the applicable administrative provisions, with which compliance is mandatory.</p> <p><u>Explanatory note:</u> The wording differs from the corresponding ECE/ISO definition because the latter is based on the definition of regulation which is not defined in this code. Furthermore the ECE/ISO definition contains a normative element which is included in the operative provisions of the Code.</p>	<p><u>Technical regulation</u> (identical)</p>	<p><u>Technical regulation</u></p> <p>A technical specification, including the applicable administrative provisions, with which compliance is mandatory.</p> <p><i>Explanatory note:</i> The wording differs from the corresponding Economic Commission for Europe/International Organization for Standardization definition because the latter is based on the definition of regulation which is not defined in this Agreement. Furthermore the Economic Commission for Europe/International Organization for Standardization definition contains a normative element which</p>

			is included in the operative provisions of this Agreement. <u>For the purposes of this Agreement, this definition covers also a standard of which the application has been made mandatory not by separate regulation but by virtue of a general law.</u>
<u>Voluntary Standards</u> This is a standard with which there is no legal obligation to comply.	<u>Standard</u> A technical specification approved by a recognized standardizing body for repeated or continuous application, with which compliance is not made mandatory. <u>Explanatory note:</u> The corresponding ECE/ISO definition contains several normative elements which are not included in the above definition. Accordingly, technical specifications which are not based on consensus are covered by the Code.	<u>Standard</u> (identical) <u>Explanatory note:</u> The corresponding ECE/ISO definition contains several normative elements which are not included in the above definition. Accordingly, technical specifications which are not based on consensus are covered by the Code. <u>This definition does not cover technical specifications prepared by an individual company for its own production or consumption</u>	<u>Standard</u> A technical specification approved by a recognized standardizing body for repeated or continuous application, with which compliance is not mandatory. <u>Explanatory note:</u> The corresponding Economic Commission for Europe/International Organization for Standardization definition contains several normative elements which are not included in the above definition. Accordingly, technical specifications which are not based on consensus are covered by this Agreement. This definition does not

		<u>requirements.</u>	cover technical specifications prepared by an individual company for its own production or consumption requirements. <u>The word "body" covers also a national standardizing system.</u>
<u>Central government body</u> This term means the central government, its ministries and departments or any body subject to the control of the central government in respect of the activity in question. In the case of the European Economic Community the provisions governing central government bodies [would] apply.	<u>Central government body</u> Central government, its ministries and departments or any body subject to the control of the central government in respect of the activity in question. In the case of the European Economic Community the provisions governing central government bodies [would] apply. <u>Explanatory note:</u> If the EEC were to sign the Code, the word “would” and the square brackets would disappear.	<u>Central government body</u> (identical)	<u>Central government body</u> Central government, its ministries and departments or any body subject to the control of the central government in respect of the activity in question. <u>Explanatory note:</u> In the case of the European Economic Community the provisions governing central government bodies apply. <u>However, regional bodies or certification systems may be established within the European Economic Community, and in such cases would be subject to the provisions of this Agreement on regional bodies or certification systems.</u>

<u>Local government body</u> This term means a government body which is not subject to the control of the central government in respect of the activity in question, such as (i) the authorities of States, Provinces, Länder, Cantons, etc. in the case of a federal or decentralized system, and (ii) local government authorities.	<u>Local government body</u> Government body which is not subject to the control of the central government in respect of the activity in question, such as: (i) the authorities of States, Provinces, Länder, Cantons, etc. in the case of a federal or decentralized system, and (ii) local government authorities.	<u>Local government body</u> (identical)	<u>Local government body</u> A government other than a central government (e.g. states, provinces, Länder, cantons, municipalities, etc.), its ministries or departments or any body subject to the control of such a government in respect of the activity in question.
<u>Regulatory body</u> This term means any central or local government body or any other body which has legal power to enforce a mandatory standard. This may or may not be the same body which prepared or adopted the standard.	<u>Regulatory body</u> A governmental or non-governmental body which has legal power to enforce a technical regulation. This may or may not be the same body which prepared or adopted the technical regulation.	<u>Regulatory body</u> (identical)	(No corresponding definition)
(No corresponding definition)	(No corresponding definition)	(No corresponding definition)	<u>Non-governmental body</u> A body other than a central government body or a local government body, including a non-governmental body which has legal

			<u>power to enforce a technical regulation.</u>
<u>Voluntary standards body</u> This term means any non-governmental organization which prepares voluntary standards for public use. Some of these are national standards bodies as defined below.	<u>Standardizing body</u> A governmental or non-governmental body, one of whose recognized activities is in the field of standardization.	<u>Standardizing body</u> (identical)	<u>Standardizing body</u> A governmental or non-governmental body, one of whose recognized activities is in the field of standardization.
<u>National standards body</u> This term means a nationally recognized standards body which is, or is eligible to become, a member of non-governmental international standards bodies.”	(No corresponding definition)	(No corresponding definition)	(No corresponding definition)

4.3.5.3 Development of disciplines in major draft *Standards Codes*

During the Tokyo Round negotiations, there had been few changes in disciplines applied to technical regulations and standards of the 1973 Proposed Draft Code until 1977. After the harmonization process with respect to terminologies and definitions of the Draft with those corresponding terms in the ECE/ISO definitions, the sub-group began to discuss disciplines and their rules. There were several major revisions and transformation of the regulatory structure to be noted.

Deletion of Article 4(d) of the 1973 Draft Code in the January 1977 Draft Code

The 1977 January Draft Code deleted Article 4(d), which had made connection between mandatory standards and voluntary standards, requiring that when voluntary standards were to be adopted as mandatory standards, there should be some relevance between them.²³³ Thus, the Draft no longer explicitly provided requirement for such situation as where mandatory standards be based on relevant and suitable voluntary standards.

Revisions to Article 3 of the 1973 Draft Code in the November 1977 Draft Code

In the 1973 Draft Code, Article 3 provides that adherents should put best effort in ensuring that local government bodies and regulatory bodies other than central government bodies comply with the provisions of Article 2 with an exception to the obligation of the GATT notification. In other words, the identical obligations except for the GATT notification obligation were applied to all kinds of mandatory standards or technical regulations in the revised drafts, regardless of their relevant bodies, - central, local, or non-government bodies. However, the November 1977 Draft Code began to contain more exceptions to the rules and procedures for technical regulations of central government bodies. With respect to local and non-government bodies, instead of confirming provision which simply affirm the application of most of the Article 2 provisions with just one exceptions, Article 3 in the November 1977

²³³ See MTN/NTM/W/71.

Draft Code now elaborated exceptions and replaced relevant provisions. It replaced Article 2 transparency rules and procedures with a similar but separate set of rules in sub-paragraphs of Article 3(b) and the subsequent exceptions to it in Article 3(c) with a view to deal with urgent problems.²³⁴

Insertion of ‘unnecessary obstacles to international trade’ and a list of reasons for exceptions where the relevant international standards are inappropriate

First, there was general understanding that the second sentence of the existing Article 2(a) of the 1973 Draft should be and replaced and two proposals were considered regarding the issue.²³⁵ Article 2 provided rules for “Preparation, adoption and use of technical regulations by central government bodies” and paragraph (a) provided that “Adherents shall ensure that technical regulations are not prepared, adopted or applied with a view to creating obstacles to international trade. They shall likewise ensure that neither technical regulations themselves nor their application have the effect of creating *an unjustifiable* obstacles to international trade”(emphasis added). Switzerland proposed to replace the second sentence by “[t]hey shall likewise ensure that neither mandatory standards themselves nor their application have the effect of creating obstacles to international trade *which are disproportionate to the legitimate objectives of the regulations concerned*”. In the meantime, Canada suggested a replacement by the sentence “[t]hey shall likewise ensure that neither mandatory standards themselves nor their application have the effect of creating obstacles to international trade *which are unnecessary for the achievement of the objectives of the mandatory standards concerned*.” However, none of the suggestions requiring ‘unjustifiable obstacles’, ‘obstacles... disproportionate to the legitimate objectives of the regulations concerned’ or ‘obstacles...unnecessary for the achievement of the objectives of...’ was eventually adopted without modification. Instead, a combination of all three phrases was finally adopted in the corresponding provision of the Tokyo Round Standards Code, which provides “[t]hey shall likewise ensure neither technical regulations nor standards themselves nor their application

²³⁴ MTN/NTM/W/119, pp. 8-9.

²³⁵ MTN/NTM/W/37, p. 3.

have the effect of creating unnecessary obstacles to international trade.²³⁶

Second, with respect to Article 2(b), the US proposed to insert a list of reasons for exceptions where international standards are considered to be inappropriate. Specifically, the US proposed to add, “for such reasons as: (i) National security or the prevention of deceptive practices; (ii) Differing levels of protection for human health or safety, animal or plant life or health, or the environment; (iii) significant climatic or other regional factors; (iv) fundamental technological incompatibility between the international standard and the needs of the adherents concerned.”²³⁷ Subsequently, these legitimate reasons for deviation from international standard seem to have been adopted. In comparison, the corresponding passage of Article 2.2 in the Tokyo Round Standards Code reads, “...except where, as duly explained upon request, such international standards or relevant parts are inappropriate for the Parties concerned, for *inter alia* such reasons as national security requirements; the prevention of deceptive practices; protection for human health or safety, animal or plant life or health, or the environment; fundamental climatic or other geographical factors; fundamental technological problems.”

4.3.5.4 Development of regulatory scopes and disciplines: An analysis of the 1978 Draft *Standards Code*

During the negotiation prior to the outcome in the Draft of October 1978, provisions of Article 2 dealt with preparation, adoption and use of mandatory standards (or technical regulations) by central government bodies; provisions of Article 3 with preparation, adoption and use of mandatory standards (or technical regulations) by local or non-governmental bodies; and Article 4 with that of voluntary standards (or standards). However, the October 1978 Draft finally incorporated a significantly different regulatory structure the previous structures. As shown in <BOX 6>, the corresponding provisions Article A.1, A.2 and A.3 in the October 1978 to the respective Articles 2, 3, and 4 in the previous Drafts now provided

²³⁶ Tokyo Round Standards Code, Article 2.1, third sentence.

²³⁷ MTN/NTM/W/37, p. 3.

rules and obligations for technical regulations and standards by central government bodies, technical regulations and standards by local government bodies and regulatory bodies other than central government bodies, and standards by non-governmental bodies, respectively.²³⁸

Box 6. Tokyo Round - Provisions for “standards” in the October 1978 Draft Standards Code

.....
II. Operative provisions

A. Technical Regulations and Standards

1. Preparation, adoption and use of technical regulations and standards by central government bodies
 2. Preparation, adoption and use of technical regulations and standards by local government bodies and regulatory bodies other than central government bodies
 3. Preparation, adoption and use of standards by non-government bodies
-

Furthermore, the majority of provisions provided the same rules for technical regulations and standards and, where there were certain exceptions for either technical regulations or standards, they were so mentioned. Thus, in terms of disciplines, technical regulations and standards were now treated without major difference. Only minor differences existed from the previous Drafts.

Common disciplines

Concerning the majority of rules and procedures, the same provisions were applied to both technical regulations and standards.²³⁹ First, non-discrimination obligations and least-trade-restrictiveness include prevention of technical regulations and standards which are prepared, adopted or applied with a view to creating obstacles to international trade, guarantee of no

²³⁸ See the 1978 Draft Standards Code in MTN/NTM/W/192.

²³⁹ See MTN/NTM/W/192.

less favourable treatment between imports and like products of national origin or between products originating in other countries, and prohibition of technical regulations or standards which create by themselves or in effect unnecessary obstacles to international trade.²⁴⁰ Second, with respect to both technical regulations and standards, adherents are obliged to use international standards as their basis except where such international standards are inappropriate and required to play a full part in the preparation of international standardizing bodies.²⁴¹ Third, both technical regulations and standards are required to be specified in terms of performance rather than design.²⁴² Fourth, whenever a relevant international standard does not exist or the technical content of a proposed technical regulation or standard is not substantially the same as the technical content of relevant international standards, and if the technical regulation or standard restricts trade, technical regulations and standards are to fulfill a series of transparency procedures. For instance, both of them are to be published as a notice in a publication at an early appropriate stage and particulars or copies of the proposed technical regulation or standard are to be provided upon request.²⁴³ In addition, adherents are required to allow reasonable time for other adherents or interested parties respectively to make comments in writing and take them into account, and may omit such of the steps where urgent problems of safety, health, environmental protection or national security arise or threaten to arise.²⁴⁴ All technical regulations and standards are required to be published, but with exceptions to urgent circumstances.²⁴⁵ Adherents are obliged to use all reasonable means within their power to ensure that regional standardizing bodies comply with the obligations in general and fulfill the obligations even if they are members of regional standardizing bodies.²⁴⁶

When the entities which prepare, adopt and apply technical regulations or standards are central government bodies, the rules and procedures described above are applied identically with a couple of exceptions as explained in the immediately following section. If those entities are local government bodies or regulatory bodies as defined in the Annex to the

²⁴⁰ MTN/NTM/W/192, 1978 Draft Code, Article II.A.1(a), p. 3.

²⁴¹ MTN/NTM/W/192, 1978 Draft Code, Article II.A.1(b) and (c), pp. 3-4.

²⁴² MTN/NTM/W/192, 1978 Draft Code, Article II.A.1(d), p. 4.

²⁴³ MTN/NTM/W/192, 1978 Draft Code, Article II.A.1(e)(i) and (iii), p. 4-5.

²⁴⁴ MTN/NTM/W/192, 1978 Draft Code, Article II.A.1(e)(iv) through (viii), p. 5-6.

²⁴⁵ MTN/NTM/W/192, 1978 Draft Code, Article II.A.1(f) and (g), p. 6.

²⁴⁶ MTN/NTM/W/192, 1978 Draft Code, Article II.A.1(h) and (j), p. 7.

October 1978 Draft, several exceptions are provided and the level of obligation is degraded under the phrase ‘...use all reasonable means within their power to ensure...’ rather than the highest possible level of obligation under the word ‘ensure’. These exceptions include such obligations as participation in international standardization process, GATT notifications, compliance of and compliance by members of regional standardization.²⁴⁷ In additions, local government and regulatory bodies are obliged to provide copies and receive comments through adherents.²⁴⁸ However, there is basically no distinctive difference in disciplines between technical regulations and standards.

Different disciplines

Among the transparency procedures, only technical regulations are required to be notified to the GATT secretariat. In specific, adherents are required to notify other adherents through the GATT secretariat.²⁴⁹ However, a phrase ‘and standard’ appears in bracket following the word ‘technical regulation’, indicating that there has been a proposal to extend the obligation to notify to the GATT secretariat to standards as well. This proposal which has never been officially adopted by any of the subsequent Drafts and final Standards Code.

In addition, the Draft stipulates a provision for preparation, adoption and application of standards by non-government body, which generally assures application of the same rules and procedures except for GATT notification and obligation of compliance of and compliance by members of regional standardizing bodies.²⁵⁰

The regulatory scope of the October 1978 Draft Code

Consequently, distinction between technical regulations and standards based on their definitions became almost meaningless from the perspective of the regulatory operation of the TBT Code. Instead, the disciplines were distinctive in terms of different levels of obligations and distinction between the standardizing bodies, whether central, local or non-government bodies became more important. Unlike in the final GATT Standards Code, the

²⁴⁷ MTN/NTM/W/192, 1978 Draft Code, Article II.A.2, p. 7.

²⁴⁸ MTN/NTM/W/192, 1978 Draft Code, Article II.A.2, p. 7.

²⁴⁹ MTN/NTM/W/192, 1978 Draft Code, Article II.A.1(e)(ii), p. 5.

²⁵⁰ MTN/NTM/W/192, 1978 Draft Code, Article II.A.3, p. 8.

1978 Draft Code still maintained the view that technical regulation was prepared, adopted and used by central government bodies, local government bodies and regulatory bodies with legal enforcement power whereas standards could be made and operated by any recognized body. Based on the analyses above, the conceptual scope of the October 1978 Draft Code's regulatory framework is drawn as in <Figure 9>.

Figure 9. Regulatory scope of the October 1978 Draft Standards Code

		Technical regulations	Standards
Central government bodies		Article 2 Preparation, adoption and use of technical regulations and standards by central government bodies	
Local government bodies		Article 3 Preparation, adoption and use of technical regulations and standards by local government bodies and regulatory bodies other than central government bodies	
Non-government bodies	Regulatory bodies		Article 4 Preparation, adoption and use of standards by non-government bodies

4.4 “Standards” in the *Standards Code*

4.4.1 Terminology and definitions

One of the major changes to the terminologies and definitions is the removal of the concept “regulatory body” from the definitions in the Annex and in the provisions of the Standards Code. The relevant articles are structured, as shown in <Box 7>, in a way that technical regulations and standards are treated by the same article; relevant articles are distinguished by different standardization bodies, central, local or non-governmental bodies. The term “regulatory body” is no longer used in the main body of the Code. In addition, the definition of “regulatory body” in the Annex is excluded. Instead, the non-government body is, then, defined as a body “other than a central government body or a local government body, including non-governmental body which has legal power to enforce a technical regulation”.

Box 7. Tokyo Round - Provisions for “standards” in the Standards Code

.....

II. Operative provisions

A. Technical Regulations and Standards

1. Preparation, adoption and application of technical regulations and standards by central government bodies
 2. Preparation, adoption and application of technical regulations and standards by local government bodies
 3. Preparation, adoption and application of technical regulations and standards by non- government bodies
-

As a result, it is inferred from the overall regulatory structure that the Standards Code now incorporates, in principle, technical regulations prepared, adopted and applied by non-

government bodies, which include regulatory body with legal power to enforce certain technical specifications. This means that the scope of technical regulation is no longer restricted to the category in which technical regulation is prepared, adopted, and applied by governmental or regulatory body with legal power; the scope now is widened to incorporate technical regulation by virtually any body. This change may reflect some socio-economic changes during the negotiation period that non-government bodies were playing more and more important role in preparing, adopting and applying certain technical regulations.

Another noteworthy revision was made to the definition of technical regulation. In the explanatory note, it was added in the last sentence that “[f]or the purposes of this Agreement, this definition covers also a standard of which the application has been made mandatory not by separate regulation but by virtue of a general law”. Therefore, the legal basis of the mandatory character was expanded to actually incorporate a quite wide scope of laws, regulations and provisions. This conceptual change may also reflect the changing trend that the concept “technical regulation” was evolving and less confined to the concept “regulation”.

Table 12. Terminologies and Definitions of the Tokyo Round Standards Code

Terminology	Definitions
1. <i>Technical specification</i>	<p>A specification contained in a document which lays down characteristics of a product such as levels of quality, performance, safety or dimensions. It may include, or deal exclusively with terminology, symbols, testing and test methods, packaging, marking or labelling requirements as they apply to a product.</p> <p><i>Explanatory note:</i> This Agreement deals only with technical specifications relating to products. Thus the wording of the corresponding Economic Commission for Europe/International Organization for Standardization definition is amended in order to exclude services and codes of practice.</p>
2. <i>Technical regulation</i>	<p>A technical specification, including the applicable administrative provisions, with which compliance is mandatory.</p> <p><i>Explanatory note:</i> The wording differs from the corresponding Economic Commission for Europe/International Organization for Standardization definition because the latter is based on the definition of regulation which is not defined in this Agreement. Furthermore the Economic Commission for Europe/International Organization for Standardization definition contains a normative element which is included in the operative</p>

	provisions of this Agreement. For the purposes of this Agreement, this definition covers also a standard of which the application has been made mandatory not by separate regulation but by virtue of a general law.
3. <i>Standard</i>	<p>A technical specification approved by a recognized standardizing body for repeated or continuous application, with which compliance is not mandatory.</p> <p><i>Explanatory note:</i> The corresponding Economic Commission for Europe/International Organization for Standardization definition contains several normative elements which are not included in the above definition. Accordingly, technical specifications which are not based on consensus are covered by this Agreement. This definition does not cover technical specifications prepared by an individual company for its own production or consumption requirements. The word "body" covers also a national standardizing system.</p>
6. <i>Central government body</i>	<p>Central government, its ministries and departments or any body subject to the control of the central government in respect of the activity in question.</p> <p><i>Explanatory note:</i> In the case of the European Economic Community the provisions governing central government bodies apply. However, regional bodies or certification systems may be established within the European Economic Community, and in such cases would be subject to the provisions of this Agreement on regional bodies or certification systems.</p>
7. <i>Local government body</i>	A government other than a central government (e.g. states, provinces, Länder, cantons, municipalities, etc.), its ministries or departments or any body subject to the control of such a government in respect of the activity in question.
8. <i>Non-governmental body</i>	A body other than a central government body or a local government body, including a non-governmental body which has legal power to enforce a technical regulation.

4.4.2 Regulatory structure of the *Standards Code*

The expansion of the scope of “technical regulation” implies that some technical specifications which had previously belonged to the category of “standard” are now moved to the category of “technical regulation”. One example subject to such a shift would be those

technical specifications which are prepared, adopted, and applied by some non-government bodies such as industrial associations which do not have legal power to enforce but are definitely in charge of establishing and applying them.

Figure 10. Regulatory scope of the Tokyo Round Standards Code

	Technical regulation	Standards
Central government bodies	Article 2 Preparation, adoption and application of technical regulations and standards by central government bodies	
Local government bodies	Article 3 Preparation, adoption and application of technical regulations and standards by local government bodies	
Non-government bodies	Article 4 Preparation, adoption and application of technical regulations and standards by non-government bodies	

Last point to note is related to the scope of standard. The insertion of the phrase “approved by a recognized standardizing body for repeated or continuous application” in the final text is based on the harmonization process with the ECE/ISO definitions. These elements are important to make distinction between standards for public purposes and those for individual or private purposes, the latter of which is explicitly excluded from the scope of “standards” for the GATT draft’s purpose. Another aspect of the “standards” scope is inferred from the changed regulatory structure. The regulatory structure now covers standards of all three levels, central, local and non-governmental levels, technical specifications which were previously left in the grey area are not subject to either Article 2 or

3. For example, standards prepared, adopted, and applied by central government bodies are now clearly subject to Article 2 and standards by local government bodies are to Article 3. It became certain that even if certain technical specifications were enacted and applied by government authorities, as long as the compliance with them were not mandatory, they were considered as “standards” and subject to specific provisions in the Code.

4.4.3 Disciplines for “standards” and “technical regulations”

4.4.3.1 Common disciplines for technical regulations and standards by central government bodies

Article 2 of the GATT Standards Code provides almost the identical sets of rules for technical regulations and standards prepared, adopted and applied by the central government bodies. The principles of least-trade restrictive means, non-discrimination and international harmonization are applied without any modification or exception to technical regulations- and standards-related activities of the central government bodies.

Article 2.1 provides that the central government should neither prepare, adopt or apply technical regulations and standards with a view to creating obstacles to international trade, nor treat them based on any discriminatory treatments. Not only technical regulations and standards themselves but their application should not have the effect of creating unnecessary obstacles to international trade.

Article 2.2 requires international harmonization for both technical regulations and standards prepared, adopted, or applied by the central government. It requires technical regulations or standards to be based on relevant international standards, except where such international standards are inappropriate for such reasons as national security requirements, prevention of deceptive practices, protection of human health or safety, animal or plant life or health, or the environment, fundamental climatic or other geographical factors and fundamental technological problems.

Article 2.3 further encourages harmonizing technical regulations or standards on as wide a basis as possible, providing that Parties play a full part within their limits of their resources in

preparation by appropriated international standardizing bodies of international standards.

Article 2.4 prefers performance-based technical regulations and standards rather than design or descriptive characteristics. Article 2.7 requires Parties to promptly publish adoption of all technical regulations and standards in such a manner to enable interested parties to become acquainted with them. Article 2.10 makes sure that the obligations in Article 2 are generally abided by when Parties are adopting a regional standard as a technical regulation or standard.

Article 2.5 provides procedural rules and obligations for notification and comment-and-reply mechanism regulating the preparation and adoption of technical regulations and standards by the central government bodies. It generally considers two situations in which Parties must notify and be in charge of other Parties' response. One of them is a situation where a relevant international standards does not exist and the other is a situation where a central government body's proposed technical regulation or standard is not substantially the same as the technical content of relevant international standards. In any of such cases, Parties have to make a public notice at an early appropriate stage of the introduction of a particular technical regulation or standard (Article 2.5.1), and have to provide, upon request, without discrimination particulars or copies of the proposed technical regulation or standard and, whenever possible, identify the parts which in substance deviate from relevant international standards (Article 2.5.3). Also, Parties have to allow, without discrimination, reasonable time for the other parties or interested parties in the other parties, respectively for a proposed technical regulation and a proposed standard, to make comments, discuss and take the written comments and the results of discussions into account (Article 2.5.4 and Article 2.5.5, respectively for technical regulation and standards).

The procedural steps for notification and comment-and-reply may be omitted when there are urgent problems of safety, health, environmental protection or national security arising or threatening to arise. However, after adoption of a technical regulation or standard for urgent problems, Parties should provide, upon request, other parties and interested parties in other parties with copies of them, respectively (Article 2.6.2). Also, even after the adoption of a technical regulation or standard for urgent problems, Parties should allow other Parties and interested parties in other parties to present comments, discuss them and take them into account (Article 2.6.3).

Article 3 and Article 4 provides central government bodies' responsibility to ensure compliance by local and non-government bodies with Article 2 and prevents them from influencing local or non-government bodies to be inconsistent with Article 2. Thus, Article 3 in respect of local government bodies and Article 4 in respect of non-government bodies provides that Parties, who are perhaps mostly likely to be represented in central government bodies, shall not take measure which have the effect of, directly or indirectly, requiring or encouraging such local government bodies or non-government bodies, respectively, to act in a manner inconsistent with any provisions of Article 2.

4.4.3.2 Different disciplines for technical regulations and standards by central government bodies

Thus, most of the provisions in Article stipulate the identical procedural and substantive rules and obligations for technical regulations and standards. It is noted, however, that central government bodies are free from the obligation to notify to the GATT of its standardization and application of standards. Such obligation to notify to the GATT is applied with respect to technical regulations. In specific, Parties are obliged to notify to other Parties through the GATT secretariat of the products to be covered by technical regulations together with a brief indication of the objective and rational of proposed technical regulations (Article 2.5.2). Parties should also allow a reasonable interval between the publication of a technical regulation and its entry into force in order to allow time for producers in exporting countries, and particularly in developing countries, to adapt their products or methods of production to the requirements of the importing country (Article 2.8). When a technical regulation is to be adopted for urgent problems, Parties should notify immediately after the adoption other Parties through the GATT secretariat of it (Article 2.6.1).

4.4.3.3 Obligations for standard-related activities by local government bodies: GATT Standards Code Article 3

Article 3 of the GATT Standards Code provides rules and obligations for preparation, adoption and application of technical regulations and standards by local government bodies.

The provision sets out requirements in a so-called ‘best effort (or best endeavor)’ language, with a specific phrase ‘shall take such reasonable measures as may be available to them to ensure’. When compared with the expression ‘shall ensure’ used in Article 2 for central government bodies’ technical regulations and standards, the obligations represented in the ‘best effort’ term in Article 2 for local government bodies’ technical regulations and standards may be considered to be somewhat degraded. Therefore, it is likely that local government bodies may justify themselves more easily for non-compliance with the rules and obligations of Article 2 through the application of the ‘best effort’ phrase. Compared with central government bodies, who must abide by all rules and obligations of Article 2, local government bodies can endeavor as far as possible to comply with them.

Also, some exceptions are specified for local government bodies. Unlike central government bodies, local government bodies are exempted from playing a full part in the preparation by international standardizing bodies of international standards for products for which they either have adopted or expect to adopt technical regulations or standards in accordance with Article 2.3. In addition, local government bodies are not required to make regional standardizing bodies of which they are members comply with provisions of Article 2 in general as stipulated in Article 2.9 and 2.10. These requirements to participate in international standardization process and to ensure regional standards to be consistent with the Article are applied only to central government bodies, not to local government bodies.

The obligation for local government to provide information is applied only with respect to preparation, adoption and application of their technical regulations, not to their activities relevant to standards. In specific, local government bodies are obliged, upon request, to provide without discrimination, to other Parties particulars or copies of the proposed technical regulation and, whenever possible, identify the parts which in substance deviate from relevant international standards (Article 2.5.3). When urgent problems of safety, health, environmental protection or national security arise or threaten to arise, local government bodies may omit such of steps enumerated in Article 2.5, but they, upon adoption of a technical regulation, have to provide, without discrimination other Parties with copies of such technical regulations (Article 2.6.2).

In addition, local government bodies are responsible for comment and discussion through the Parties or understandingly through their central government bodies. Therefore, in regard

to technical regulations, local government bodies shall allow through their central government bodies, without discrimination, reasonable time for other parties to make comments in writing, discuss these comments upon request, and take these written comments and the results of these discussions into account (Article 2.5.4). When urgent problems of safety, health, environmental protection or national security arise or threaten to arise, local government bodies may omit such steps provided in Article 2.5, but they with the help of central government bodies, upon adoption of technical regulation, have to allow, without discrimination, other Parties to present their comments in writing upon request, discuss these comments with other Parties and take the written comments and the results of any such discussion into account (Article 2.6.3).

4.4.3.4 Obligations for standard-related activities by non-government bodies: GATT Standards Code Article 4

Article 4 provides rules and obligations for preparation, adoption and application of technical regulations and standards by non-governmental bodies. It basically makes sure that Parties ensure non-governmental bodies within their territories to comply with provisions of Article 2. Similarly with the way of assuring local government bodies' compliance or namely, 'best effort' practice, Parties are obliged to 'take such reasonable measures as may be available to them' to bring non-government bodies' activities relating to technical regulations and standards into conformity with Article 2.

Unlike the exceptions for local government bodies, non-government bodies are required to take a full part in preparation of international standardizations with respect to their technical regulations or standards and thus article 2.3 applies. Also, non-government bodies' best effort to ensure activities of regional standardizing bodies in conformity with Article 2 is required and, thus, provisions of Article 2.9 and Article 2.10 apply.

Non-government bodies are exempted from notifying their technical regulations or standards to other Parties or interested parties in other Parties, respectively, through the GATT secretariat. In other words, Article 2.5.2 does not apply.

However, all other rules for transparency provided in Article 2.5 and 2.6 are applied to activities of non-government bodies regarding technical regulations and standards. Non-

government bodies are required to provide other Parties or interested parties in other Parties with information of their technical regulations or standards, allow, without discrimination, reasonable time for comment and discussion when their technical regulations or standards deviate from international standards and may have a significant effect on trade of other Parties or other interested parties in other Parties.

Table 13. Common and different disciplines for central, local and non-government bodies in the Tokyo Round Standards Code

Central government bodies' technical regulations and standards	Local government bodies' technical regulations and standards	Non-government bodies' technical regulations and standards
Article 2.1 Non-discrimination; not creating unnecessary obstacles	0	0
Article 2.2 Use of international standards as a basis; deviation allowed when duly explained	0	0
Article 2.3 Participation in international standardization	X	0
Article 2.4 Preference for performance-basis	0	0
Article 2.5 When deviating from international standards and having a significant trade obstacle		
- 2.5.1 publish a notice of a proposed technical regulation or standard in publication	0	0
- 2.5.2 Notify the GATT secretariat a proposed technical regulation	X	X
- 2.5.3 Provide copies of the proposed technical regulation or standard upon request	0 (only for technical regulations)	0
- 2.5.4 Allow reasonable time for comment and discussion with respect to technical regulations	0 (through Parties)	0 (to other Parties and to interested parties in other Parties)
- 2.5.5 Allow reasonable time for comment and discussion with respect to standards	0	0
Article 2.6 Where urgent problems arise or threaten to arise, omission of some steps in Article 2.5 is allowed; but,	0	0

upon adoption:		
- 2.6.1 Notify immediately the GATT secretariat of the particular technical regulation	0	0
- 2.6.2 Provide copies of the technical regulations and standards upon request	0 (only for technical regulations)	0
-2.6.3 Allow reasonable time for comment and discussion with respect to technical regulations and standards	0 (through Parties)	0 (to other Parties and to interested parties in other Parties)
-2.6.4 Take into account the result of consultation carried out by Article 14(dispute settlement)	0	0
2.7 Promptly publish all technical regulations and standards	0	0
2.8 Allow a reasonable interval for producers in exporting countries and particularly developing countries, with respect to technical regulations	0	0
2.9 Ensure compliance of regional standardizing bodies with Article 2	X	0
2.10 When adopting regional standards, fulfil the obligations of Article 2 with respect to technical regulations and standards	X	0

4.5 “Standards” during the Uruguay Round Negotiations

4.5.1 Overview of the Uruguay Round negotiations on “standards”

The Uruguay Round Multilateral Trade Negotiations was launched on September 22, 1986, with ultimate goals to remove distortions to international trade, to further the objectives of the

GATT and to develop a more open, viable and durable multilateral trading system.²⁵¹ The negotiation round had fifteen negotiating groups including many non-tariff measures groups such as standards, services, trade-related aspects of intellectual property rights, trade-related investment measures and some sensitive sector groups such as agricultural products and tropical products groups.

The Non-Tariff Measures (NTM) Group whose goal was to ‘reduce or eliminate non-tariff measures, including quantitative restrictions’ dealt with the issues of technical barriers to trade.²⁵² In September 1987, the TBT Committee took note of the Negotiating Plan for MTN Agreements and Arrangements and agreed to prepare a list of items that might be addressed in discussions on the further improvement, clarification or expansion of the Agreement on Technical Barriers to Trade.²⁵³ The items suggested by individual parties for discussion and examination included items relating to the further improvement of the Agreement, items relating to the further clarification of the Agreement, items relating to the further expansion of the Agreement.²⁵⁴

Among the items relating to the further improvement of the Agreement, the most important ones included issues for the adoption of Code of Good Practice for non-governmental standardizing bodies, voluntary draft standards and their status, information on voluntary standards being made mandatory by legislation, establishing a method of ensuring compatibility of standards issued by recognized national bodies and other standardization bodies within parties, transparency on bilateral standards-related agreements, transparency on regional standards activities, languages for exchange of documents.²⁵⁵ Items relating to the further clarification of the Agreement included issues on process and production methods, and re-examination of the provisions of the Agreement in the light of the recommendations and decisions adopted by the Committee. Items relating to the further expansion of the Agreement contained issues concerning testing, inspection and type approval, transparency of the operation of certification systems, transparency in the drafting process of standards, technical regulations and rules of certification systems, and extension of major obligations

²⁵¹ GATT Doc. No. MIN.DEC (Sept.20, 1986), p.1.

²⁵² GATT Doc. No. MIN.DEC (Sept.20, 1986), p.5.

²⁵³ TBT/M/25, para. 17.

²⁵⁴ See MTN.GNG/NG8/W/25.

²⁵⁵ See MTN.GNG/NG8/W/13.

Table 14. A summary of major issues negotiated during the Uruguay Round

	Issues related to technical regulations	Issues relate to standards
Issues related to central government bodies	- Proposal by Canada to amend Article 2.1 with the insertion of sub-paragraphs for ‘unnecessary obstacles to trade’ ²⁵⁶	
Issues related to local government bodies	- Proposal by the EC on extension of major obligations, particularly the obligation of notification, under the Agreement to local government bodies through amendment of Article 3.1. ²⁵⁷	
Issues related to non-government bodies		- Proposal by the EC on the Code of Good Practice for non-governmental standardizing bodies. ²⁵⁸
Issues related to all standardizing bodies, governmental or non-governmental		- Proposal by India on voluntary draft standards and their status ²⁵⁹
		- Proposal by India on information on voluntary standards being made mandatory by legislation ²⁶⁰
		- Proposal by the US on transparency on bilateral standards-related agreements ²⁶¹
		- Proposal by the US on transparency on regional standards activities ²⁶²
	- Issues raised by the US on process and production methods ²⁶³	
	- Proposal by New Zealand on process and production methods ²⁶⁴	
	- Proposal by the Nordics (Finland) on re-examination of the provisions of the Agreement in the light of the recommendations and decisions adopted by the Committee ²⁶⁵	
	- Proposal by Japan on transparency in the drafting process or standards, technical regulations and rules of certification systems ²⁶⁶	
	- Issue of the Agreement’s coverage on labelling requirements ²⁶⁷	

²⁵⁶ Relevant documents are TBT/W/144.

²⁵⁷ Relevant documents are MTN.GNG/NG8/W/8, TBT/W/113, TBT/W/147.

²⁵⁸ Relevant documents are MTN.GNG/NG8/W/8, TBT/W/124, TBT/W/137, MTN.GNG/NG8/W/71, TBT/W/146, TBT/W/158, TBT/W/168, TBT/W/178, TBT/W/179, TBT/W/187.

²⁵⁹ MTN.GNG/NG8/W/9.

²⁶⁰ MTN.GNG/NG8/W/9.

²⁶¹ MTN.GNG/NG8/W/1.

²⁶² MTN.GNG/NG8/W/1.

²⁶³ Relevant documents are MTN.GNG/NG8/W/1, TBT/W/108/Add1, MTN.GNG/NG8/W/58.

²⁶⁴ Relevant documents are MTN.GNG/NG8/W/58, TBT/W/15, TBT/W/24, TBT/W/27, TBT/W/33, TBT/W/33/Add.1, MTN.GNG/NG8/W/24.

²⁶⁵ Relevant documents are MTN.GNG/NG8/W/13, TBT/Spec/23, TBT/W/156, TBT/W/159.

²⁶⁶ MTN.GNG/NG8/W/6.

²⁶⁷ Relevant documents are TBT/M/40, TBT/Spec/23, TBT/M/42, TBT/W/159, L/7107.

under the Agreement to local government bodies.

These issues may be divided into categories of issues related to technical regulations or those related to standards or those to both and also into categories of issues related to central government bodies, local government bodies, non-government bodies or both. <Table 14> illustrates relevant issues of each category.

Among the three categories of issues submitted to the TBT Committee, main discussion was concentrated on enhancing the implementation of local government bodies with respect to their technical regulations and standards, the operation of the Agreement concerning standards activities and clarification of the Agreement's coverage, regarding the including of PPMs, labeling in particular. In addition, the negotiation also addressed the Agreement's disciplines concerning testing and inspection procedures²⁶⁸ and overall improvement in transparency²⁶⁹. Overall, the Agreement's regulatory structure went through a significant change with the annexation of the Code of Good Practice for standards disciplines to the Agreement. The overview of the negotiation process and major issues discussed during the Uruguay Round is summarized and depicted in <Figure 11>.

As Stewart(1993) describes, there had been little negotiation progress over the issues stated above until 1989.²⁷⁰ The early negotiations concentrated on discussion over the testing and inspection procedures, improvement in transparency, insertion of the Code of Good Practice for Standards preparation and application, clarification of the Agreement's coverage with respect to PPMs and compliance of local government bodies. In the middle of 1990, the MTN negotiation group had to prepare a final draft package in order to submit it to the Trade Negotiations Committee meetings scheduled at the end of July. Accordingly, the first draft text, namely, the July 1990 Draft, was completed, reflecting all of the proposals and suggestions discussed in the previous sessions.²⁷¹ In September and October 1990, the informal group met and revised the July 1990 Draft, reflecting the results of consultation

²⁶⁸ Relevant documents are TBT/W/118, TBT/W/119, TBT/W/126, TBT/W/127/Rev1, TBT/W/138, MTN.GNG/NG8/W/69.

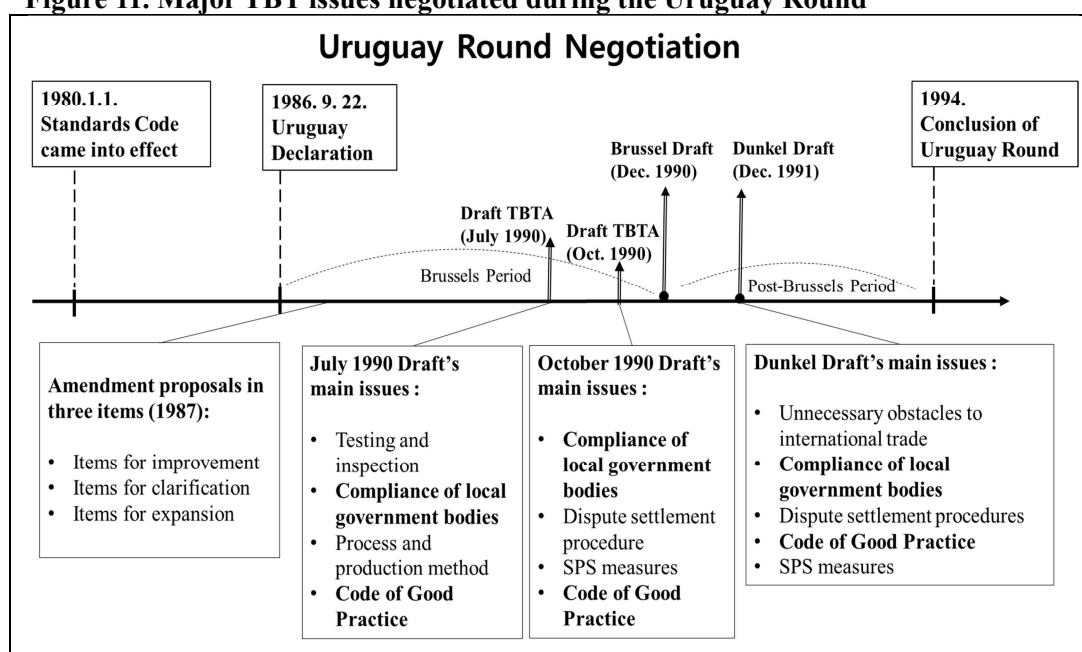
²⁶⁹ Relevant documents are TBT/W/120, MTN/GNG/NG8/W/34, MTN/GNG/NG8/W/34/Add.1, MTN/GNG/NG8/W/34/Rev.2, MTN/GNG/NG8/W/34/Rev.3, MTN/GNG/NG8/W/35.

²⁷⁰ Stewart (1993), pp. 1099.

²⁷¹ Negotiating Group on MTN, AGREEMENT ON TECHNICAL BARRIERS TO TRADE, MTN.GNG/NG8/W/83/Add.3, 23 July 1990.

during the informal meetings. This draft, namely the October 1990, had left still unresolved major issues like (1) compliance of local government, which needed to be specified and intensified; (2) dispute settlement procedures, which needed to be reconsidered in the Negotiating Group on Dispute Settlement; (3) relation with the regime for SPS measures based on the outcomes under the Negotiating Group on Agriculture; and (4) insertion of the Code of Good Practice.

Figure 11. Major TBT issues negotiated during the Uruguay Round



Source: Author's analysis

In 1991, as the negotiation formally restarted, the fifteen original negotiating groups were reduced to seven, among which the fourth “Rule-Making” group addressed a broad scope of issues, including TBT.²⁷² In preparing the so called Dunkel Draft, the group discussed several remaining issues including compliance of local government bodies, dispute settlement procedures, Code of Good Practice for standards, SPS measures and clarification of

²⁷² Stewart (1993), p. 1103.

unnecessary obstacles to trade. During the period between the Brussel's Draft and Dunkel's Draft, the TBT negotiations were largely carried out in the form of informal consultations, which eventually led to a completion of the final draft by the end of 1991.²⁷³ The Brussel versions and Dunkel versions are almost identical, except for the disciplines on conformity assessment procedures by local government and non-government bodies.²⁷⁴

In general, the TBT negotiations was progressed rather swiftly and considered to be less controversial when compared with other areas of negotiation. The outcome was also proved to be successful.²⁷⁵

4.5.2 Major issues related to both “technical regulations” and “standards”

4.5.2.1 An issue of Article 2.1 “unnecessary obstacles to international trade”

Article 2.1 of the Tokyo Round Standards Code provides that technical regulations and standards are not prepared, adopted or applied with a view to creating obstacles to international trade. Furthermore, the subsequent provision of the Article stipulates non-discrimination principle. The last sentence of the Article requires that neither technical regulations nor standards themselves nor their application have the effect of creating “unnecessary obstacles to international trade”.

In practice, the implementation and application of the provision for “unnecessary obstacles to international trade” was quite limited since it lacked specific criteria for determining whether certain measures are necessary trade obstacles or not. Nevertheless, there was increasingly need for governments as well as non-governmental bodies to adopt not only measures for traditional purposes such as protection of human, plant, or animal life or health or protection of environment but also measures for relatively new policy concerns as quality

²⁷³ Trade Negotiations Committee, DRAFT FINAL ACT EMBODYING THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS, MTN.TNC/W/FA, 20 December 1991.

²⁷⁴ Stewart (1993), p. 1104.

²⁷⁵ Stewart (1993), p. 1105.

control, industrial compatibility and information. Also, some measures were applied according to implementation of intergovernmental protocols and conventions and international or regional standards.

Box 8. Uruguay Round - Canada's amendment proposal for Article 2.1

<p style="text-align: center;">Article 2 Preparation, adoption and application of technical regulations and standards by central government bodies</p>	
<p>With respect to their central government bodies:</p>	
<p>2.1 Parties shall ensure that technical regulations and standards are not prepared, adopted or applied with a view to creating obstacles to international trade. Furthermore, products imported from the territory of any Party shall be accorded treatment no less favorable than that accorded to like products of national origin and to like products originating in any other country in relation to such technical regulations or standards. <i>They shall likewise ensure that neither technical regulations nor standards themselves nor their application have the effect of creating unnecessary obstacles to international trade. In so doing, Parties shall, inter alia, ensure that technical regulations and standards including changes thereto: (emphasis added)</i></p>	
2.1.1	<u>do not contain requirements that are greater than necessary to meet objectives consistent with this Article and the specific circumstances giving rise to their adoption;</u>
2.1.2	<u>are based on an acceptable degree of risk associated with their objectives by taking into account, inter alia, scientific and technical evidence, consumer applications, relevant processing technology;</u>
2.1.3	<u>are not maintained if the circumstances giving rise to their adoption no longer exist or if the changed circumstances can be addressed in a less trade-restrictive manner;</u>
2.1.4	<u>are not applied in such a way as to affect imported products either originating in geographic areas where the problem being addressed does not occur or destined for industrial or consumer application where the problem does not exist;</u>
2.1.5	<u>are consistent with provisions of this Article when adopted to secure compliance with international agreements or standards;</u>
2.1.6	<u>are consistent with provisions of this Article if different from international standards for reasons given in Article 2.2.</u> (proposed subparagraphs underlined)

Therefore, some Parties found it necessary to incorporate more specific principles and rules for applying the provisions. Particularly, Canada proposed to introduce principles of proportional and digressive application to address the problem of limited application. Thus, it

proposed to insert several new sub-paragraphs following the provision preventing creation of unnecessary obstacles to trade.²⁷⁶ The original content and format of Canada' amendment proposal is reproduced in < Box 8>.

Box 9. Uruguay Round – Amendment proposals for Article 2.1 and 2.2

Article 2

Preparation, adoption and application of technical regulations by central government bodies

2.1 Parties shall ensure that in respect of technical regulations, products imported from the territory of any Party shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.

2.2 Parties shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, *inter alia*, national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, *inter alia*, available scientific and technical information, related processing technology or intended end uses of products.

Thus, the provision for preventing “unnecessary obstacles to international trade” and its proposed sub-paragraphs were separated from Article 2.1 of the Tokyo Round Standards Code and were provided in the early July 1990 Draft by an independent Article, that is, Article 2.2.²⁷⁷ The content and format of Article 2.2 in the July 1990 Draft, however, was soon revised and shortened. Article 2.2 of October 1990 Draft contains four relevant sentences, instead of provisions and subsequent sub-paragraphs, which require “legitimate purposes” for technical regulations, suggest an indicative list of examples of legitimate purposes and ask to assess risk with consideration of relevant elements.²⁷⁸ The original proposals for Article 2.1 and 2.2 are reproduced and provided in <Box 9>.

²⁷⁶ TBT/W/144, pp. 5-6.

²⁷⁷ MTN.GNG/NG8/W/83/Add.3, p. 5.

²⁷⁸ MTN.GNG/NG8/W/83/Add.3/Rev.1, pp. 4-5.

These legal elements as well as the format of Article 2.2 first represented in October 1990 Draft has been maintained throughout the UR negotiation process and was finally adopted without any changes by the WTO TBT Agreement.

4.5.2.2 An issue of enhancing the compliance of local government bodies

Article 3 of the Tokyo Round Standards Code rules for preparation adoption and application of technical regulations and standards by local government bodies. In practice, implementation by local government bodies was found to be limited. Not only the limited compliance but non-reciprocal burden of obligation among Parties were main problems. In other words, local governments of some Parties played major and leading roles in domestic standardization and thus were considered more important in economic and trade terms than those of other Parties. However, they were not directly addressed by the TBT Agreement and often escaped the regime while central government bodies which play equally important roles in domestic standardization were directly ruled by the TBT Agreement and that with the full force of the obligation.

On the reasoning, the EEC proposed to enlarge the obligations of Parties so that Parties became more responsible for the compliance of local government bodies. Particularly, the EEC proposed to include a procedure by which a draft technical regulation of a local government body is notified through the Party to other Parties, whenever its technical content deviates from relevant international standards or previously notified national technical regulation and the draft technical regulation may have a significant effect on trade of Parties.²⁷⁹ Thus, the EEC proposed to replace Article 3 of the Tokyo Round Standards Code by a provision with two sub-paragraphs. In the proposed provision, as shown in <BOX 10>, Article 3.1 requires Parties to “ensure” that local government bodies and non-government bodies comply with all the provisions of Article 2 without exceptions. The proposed Article only mentions that Parties have to note, at the same time, that notification shall not be required for technical regulations if their technical content is substantially the same as that of previously notified domestic technical regulation of central government body and that

²⁷⁹ See TBT/W/113.

contracts with other Parties, including the notification, provision of information, comments and discussion shall take place through the Party concerned.

Box 10. Uruguay Round - EEC's amendment proposal for Article 3

Article 3

Preparation, adoption and application of technical regulation by local government bodies and non-governmental bodies

3.1 Parties shall ensure that local government bodies and non-government bodies within their territories comply with the provisions of Article 2, noting that:

3.1.1 notification shall not be required for technical regulations the technical content of which is substantially the same as that of previously notified technical regulations of central government bodies of the Party concerned; and that

3.1.2 contracts with other Parties, including the notifications, provision of information, comments and discussion referred to in Article 2, paragraph 5 and 6, shall take place through the Party concerned.

Exactly the same contents and format of the proposed Article 2 by the ECC are represented in the July 1990 Draft and October 1990 Draft.²⁸⁰ However, the October 1990 Draft considered another alternative as well which seems to have been based on a revival of the previous contents and formats found in Article 3 of the Tokyo Round Standards Code. The alternative provisions reads as follows:

Box 11. Uruguay Round - An alternative amendment proposal for Article 3

[3.1 Parties shall take such reasonable measures as may be available to them to ensure that local government bodies and non-governmental bodies within their territories comply with the provisions of Article 2, with the exception of the obligation to notify proposed technical regulations. Contracts with other Parties may be required to take place through the Party concerned. In addition, Parties shall not take measures which require or encourage such bodies to act in a manner inconsistent with the provisions of Article 2.]

By the time Dunkel Draft was written, local government obligations were added with more provisions and Parties are not only required not to take measures which require or encourage

²⁸⁰ MTN.GNG/NG8/W/83/Add.3, p. 8. MTN.GNG/NG8/W/83/Add.3/Rev.1, p. 7.

local or non-governmental bodies to act inconsistently with Article 2, but also required to be fully responsible for the observance of all provisions.²⁸¹ Thus, Parties' responsibility in implementing the provision was more tightened through the five paragraphs in the final Agreement.

4.5.2.3 An issue of covering process and production methods

Annex 1.1 of the Tokyo Round Standards Code defines "technical specification" as a document which lays down characteristics of a product such as levels of quality, performance, safety or dimensions. It further explains that it may include, or deal exclusively with terminology, symbols, testing and test methods, packaging, marking or labeling requirements as they apply to a product. Its footnote conforms that the Tokyo Round TBT Agreement deals only with technical specifications relating to products while excluding services and codes of practice unlike the meaning of the corresponding term in the ISO/IEC definition.

However, Article 14.25 reads: "The dispute settlement procedures set out above can be invoked in cases where a Party considers that obligations under this Agreement are being circumvented by the drafting of requirements in terms of processes and production methods rather than in terms of characteristics of products."

Thus, the definition of "technical specification" explicitly sets the scope of the Agreement to be limited to products only whereas the scope of dispute settlement procedures can be invoked in cases where there is a circumvention in terms of PPM rather than in terms of characteristics of products. The inconsistency between the two provisions has long confused Parties and, despite several years of the Agreement's operation, there was no clear consensus among them on the Agreement's coverage of PPMs before the Uruguay Round began.

Accordingly, the US proposed the issue of the Agreement's coverage on PPMs at meetings during the Uruguay Round negotiation and New Zealand made subsequent proposal regarding the issue. The US pointed out that PPMs had been widely used and were being increasingly used, particularly in areas of industrial process and agricultural production and accordingly proposed that the definition of a technical specification be amended to include process and

²⁸¹ See MTN.TNC/W/FA.

production method.²⁸² It suggested that the definition of “technical specification” in Annex 1.1 encompass PPMs and the “Explanatory Note” applicable to technical specifications be deleted. It also proposed to amend some words in Article 14.25 of the Agreement but basically suggested to maintain its applicable scope to PPMs-related matters.

Box 12. Uruguay Round - US amendment proposals to explicitly include PPMs

<p><u>Proposals for amendment</u></p>	<p><u>Annex 1.1 Technical specification</u> A specification contained in a document which lays down characteristics of a product such as levels of performance, quality, safety or dimensions. It may include, or deal exclusively with terminology, symbols, testing and test methods, packaging, marking or labelling requirements, processes, conditions of growth and production methods.</p> <p><u>Article 14.25 of the Agreement</u> The dispute procedures set out above can be invoked in cases where a Party considers that benefits under this Agreement are being nullified or impaired by the drafting of requirements in terms of processes and production methods rather than in terms of characteristics of products.</p>
<p><u>Proposals for insertion</u></p>	<p><u>Process or Production Method (PPM) :</u> One or more planned actions in a series of conditions or operations (e.g. mechanical, electrical, chemical, inspection, test) by means of which a material or product advances from one stage to its final state. PPMs include conditions of growth as well as controlled treatments that subject materials or products to the influence of one or more types of energy (e.g. human, animal, mechanical, electrical, chemical, thermal) as required to achieve a desired reaction, change, result or performance.</p> <p><u>PPM Standard (or PPM provision within a product or process standard) :</u> Standard or provision that specifies the process or production method to be employed in one or more stages in the design, manufacture, delivery, installation, treatment, or utilization of equipment, structures or products, or that specifies methods or conditions in accordance with which a product is to be grown or raised. Testing or certification for conformity with these methods, rather than the characteristics of the final product, is required in conjunction with one or more steps in the process.</p>

²⁸² See MTN.GNG/NG8/W/1 and MTN.GNG/NG8/W/24.

Furthermore, the US tried to insert a definition of “Process or Production Methods (PPMs)” and “PPM standard (or PPM provision within a product or process standard)” and suggested detailed definitions of them respectively.²⁸³ In response to the US proposal, New Zealand basically stated its support for amending the relevant provisions and expressed its view that there was no major legal problems in applying to PPMs the substantive disciplines of the Agreement such as principles of transparency, national treatment, use of international standards as a basis.²⁸⁴

Box 13. Uruguay Round - New Zealand’s proposals to incorporate PPMs

<p><u>Proposals for deletion</u></p>	<p><u>Article 14.25 of the Agreement</u> <i>The dispute procedures set out above can be invoked in cases where a Party considers that benefits under this Agreement are being nullified or impaired by the drafting of requirements in terms of processes and production methods rather than in terms of characteristics of products. (deletion proposed)</i></p>
<p><u>Proposals for insertion</u></p>	<p><u>Annex 1.1 Technical specification</u> A specification contained in a document which lays down characteristics of a product such as levels of performance, quality, safety or dimensions. It may include, or deal exclusively with terminology, symbols, testing and test methods, packaging, marking or labelling requirements, processes, conditions of growth, and production methods. <i>It may also include processes and production methods insofar as they are necessary to achieve the requirement characteristics of a product. (insertion proposed)</i></p> <p><u>Process and production method</u> <i>Wherever appropriate, Parties shall specify technical regulations and standards in terms of performance rather than design or descriptive characteristics, or processes and production methods. (insertion proposed)</i></p>

²⁸³ See TBT/W/108/Add.1.

²⁸⁴ See MTN.GNG/NG8/W/58. New Zealand noted that there was a need to consider one aspect of the regime. One area where specific PPM-related provisions would be required was the determination of conformity. Provisions needed to be made for the cooperation of the exporting country in the process of determining conformity, since the testing procedures under Article 5.1 cannot, because of the nature of PPMs, be applied. In order to ensure implementation of a PPM-based regulation or standard, means other than testing would be required. New Zealand illustrated a possibility of on-site inspection in the exporting country as an example. It also examined a need to establish a principle of equivalency, so as to allow exporting parties to meet the regulation or standard by a PPM which may not be exactly the same. Acceptance of this principle, as New Zealand explained, would help remove a potential source of unjustified trade barriers. Thus, New Zealand proposed to amend Article 5.2 as well, explanation of which would be out of the scope of this study.

Nevertheless, New Zealand proposed to clearly include PPMs into the definition of technical specification and, thus, suggested to insert an additional sentence after the definition of the Tokyo Round Agreement to clearly extend its scope to PPMs. Also, it proposed to insert a broader and simpler overall definition of PPMs than the ones proposed by the US, if it were to include any definition; basically, it believed that a definition was not absolutely necessary. Then, it had the view that incorporation of PPM in the coverage of the Agreement and its subsequent operation itself would be effective enough to prevent a circumvention and PPM related trade barrier and therefore, proposed to delete Article 14.25, legal basis to dispute against circumvention through PPM measures where an alternative non-PPM standard is available.

Eventually, the definition of technical specification was deleted in the final draft and definitions of technical regulations and standards were revised to include PPMs. Article 14.25 of the Tokyo Round Standards Code was deleted since the provisions for consultation and dispute settlement went through substantial changes at the final stage. Particularly, scope of invocation extended to “any matter affecting the operation of this Agreement”, well encompassing matters related to products as well as procedures and production methods.²⁸⁵

4.5.2.4 An issue of considering a labelling as a technical regulation

Prior to the Committee meeting on 31 May 1991, the US had commented that Mexico had not notified some requirements on the labelling of certain textile products. At the May meeting, Mexico responded that the requirement on the labelling bore only commercial information, not quality standards, and it was applied to all products regardless of their origin.

Mexico reasoned that, since the requirement on the labelling was not relevant to product quality, it was not a “technical regulation” within the meaning of Annex 1 of the agreement.²⁸⁶ Mexico interpreted that the second sentence of Annex 1.1 of the Agreement was illustrative of the first, so that a labelling requirement should be notified only if it contained product specifications.

²⁸⁵ TBT Agreement, Article 14.1.

²⁸⁶ TBT/M/40, pp. 3-4.

On the contrary, the US argued that there was no notification before the entry into force of the regulations without any opportunity to comment provided.²⁸⁷ The US had the view that labelling is a technical regulation if its compliance was mandatory, regardless of the characteristics of labelling requirements.

Finland and the EC agreed with the US. According to Finland, the drafters of the Agreement had intended that the second sentence of Annex 1.1 should be additional to the first, not merely illustrative of it. Therefore, all labelling requirements, as long as they were mandatory, were technical regulations and should be notified regardless of what was printed on the label. Finland further noted that the inclusion of “test methods” in the second sentence of Annex 1.1 was a strong supporting evidence for its position. It explained that a test method could not include technical specifications which laid down “characteristics of a product”, yet it was clear that it was covered by the term “technical specifications”. Furthermore, the new draft text of the Agreement which had been negotiated in the Uruguay Round included the word “also” at the beginning of the second sentence in Annex 1.1, and this pointed again to the conclusion that this sentence was additional to the first.²⁸⁸ Finland argued that if labelling requirements were not mandatory, they were covered by the meaning of “standards” given in Annex 1.3, and were notifiable upon request to other interested Parties under Article 2.5.3 of the Agreement. The US and the EC consented to Finland’s interpretations and arguments.²⁸⁹

Upon the request by the delegation of Mexico to clarify the coverage of the Agreement with respect to “labelling requirements”, the Committee began to examine whether the obligation to notify labelling requirements is also applied to labelling requirements that did not contain “technical specifications” under Article 2.5 of the Agreements. The obligation of notification is provided in Article 2.5 and the Committee explained that the provision addressed “technical regulations or standards” which “may have a significant effect on trade of other Parties” and its sub-paragraph 2 requires all such technical regulations to be notified. Having reviewed the notification obligation, the Committee, then turned to examine the

²⁸⁷ See TBT/Spec/23.

²⁸⁸ MTN.GNG/NG8/W/83/Add.3, p. 41. The definition of “technical specification” in Annex 1.1 to the Tokyo Round Standards Code did not include the word “also”. However, the corresponding definition of “standards” in the 1990 July Draft contains the word “also”.

²⁸⁹ TBT/Spec/23, para 5.

definition of technical regulations, which are mandatory technical specifications, and labelling requirements are explicitly described as one possible type of technical specification. Accordingly, the Committee concluded that as long as it is mandatory for a product to bear a label if it is to enter the domestic market, and that the labelling requirement may have a significant effect on trade, then the labelling requirement should be notified. It confirmed that this would hold regardless of what is printed on the label. The relevant passage in the note by the Secretariat reads,

“It would therefore appear that as long as it is mandatory for a product to bear a label if it is to enter the domestic market, and that the labelling requirement may have a significant effect on trade, then the labelling requirement should be notified. That conclusion would appear to stand regardless of what is printed on the label. In some circumstances it may be that technical specifications have to be printed on the label; but even if the label contains nothing more than consumer information (e.g. on cleaning or washing guidelines), it would seem that it should be notified as long as the label is mandatory and it may have a significant effect on trade.”

Subsequently, the Committee agreed to conclude with adoption of the draft decision which was reproduced as in the following <Box 14>.

Box 14. Uruguay Round - The Committee decision on the scope of labelling

In conformity with Article 2.5 of the Agreement, Parties are obliged to notify all mandatory labelling requirement that are not based substantially on a relevant international standard and that may have a significant effect on the trade of other Parties. That obligation is not dependent upon the kind of information which provided on the label, whether it is in the nature of a technical specification or not.

The draft decision was adopted at the 13th Annual review meeting held on 19 October 1992.²⁹⁰ In the draft decision, notification was not required for mandatory labeling requirements that did not use relevant international standards as their basis.

4.5.2.5 Discussion on information of voluntary draft standards and voluntary standards being made mandatory by legislation

The Tokyo Round Standards Code treats technical regulations and standards almost equally in terms of their obligations. Therefore, most of provisions sets out the same rules and procedures for technical regulations and standards except for notification obligation. The Code provides different provisions in accordance with standardization bodies, that is, central government bodies, local government bodies and non-government bodies. Thus, Article 2, Article 3 and Article 4 respectively provides for preparation, adoption and application of technical regulations and standards by central government bodies, local government bodies, and non-government bodies.

Years of the operation of the Standards Code after the Tokyo Round had proved, however, that implement of the Code with respect to voluntary standards was not fulfilled and that relatively less sufficiently despite their importance as a trade barrier. Particularly, information of draft standards and standards which were to be made mandatory by legislation was neither notified nor hard to obtain, constituting significant trade barriers.

Accordingly, India proposed to make it a requirement that standards and standards being made mandatory by legislation be notified in advance. India said, "Many parties are not notifying voluntary draft standards although these are national standards. In some cases, even though these are not national standards, their wide adoption by the local industry gives them a status similar to that of national standards. Article 2.5.2 requires notification only of technical regulations. Considering that many voluntary standards can hinder trade because of their wide adoption, it is essential that voluntary standards covering products of trade

²⁹⁰ See L/7107. The background information regarding the Committee's thirteenth annual review of the implementation and operation of the Agreement is found in TBT/34.

significance are also notified.”²⁹¹

Within the meaning of definition 3 in Annex 1, standards contain technical specifications approved by a recognized standardizing body but with which compliance is not mandatory. Although their compliance may not be made mandatory, their wide adoption and use by the national industry can constitute as high trade barriers as those created by technical regulations whose compliance is mandatory.

In addition, it was found to be a common practice that voluntary standards were favorably taken into account when mandatory standards were being enacted. Furthermore, some standards were made mandatory by a set of multiple legal basis, which information was not easily obtained by foreign producers. Therefore, the negotiating parties were concerned about the powerful trade barrier effect of voluntary standards despite their voluntary characteristics.

India, for example, raised issues regarding voluntary standards which were made mandatory, describing and proposing that “[i]n some cases, voluntary standards are made mandatory as they are referred to in legislation. This information should be also notified to other Parties. In many cases, statutory orders under different pieces of legislation make standards mandatory. This information should be notified as this changes the status of the voluntary standards”.²⁹² Thus, India suggested that at least transparent transformation from voluntary standards to mandatory standards as well as their information would help reduce trade barriers.

It is important to note, however, that the Committee described the issue slightly differently from India’s proposal. The Committee first mentions definition of “technical regulation” in Annex 1.2. It further noted that the explanatory note to Annex 1.2 definition states that technical regulation also includes a standard of which the application has been made “mandatory not by separate regulation but by virtue of a general law”. Therefore, although notification obligation in Article 2.5.2 is applied only to technical regulations, standards which are made mandatory by statutory order or legislation are considered technical regulations, and the Agreement can apply the provision of Article 2.5.2 to standards which are

²⁹¹ MTN.GNG/NG8/W/25, para. 12. The original communication from India is documented in MTN.GNG/NG8/W/9.

²⁹² MTN.GNG/NG8/W/25, para. 16.

being made mandatory.

4.5.3 Issues of inserting a Code of Good Practice for ‘standards’ disciplines

The issue of inserting a Code of Good Practice for ‘standards’ disciplines was first submitted in late 1985 during the Second Three-Year Review Meeting on the operation and implementation of the TBT Agreement. The idea was first presented and largely drafted by the EU but the first proposal went through significant changes and revisions in terms of its status and purposes. In short, initially, the code of Good Practice was proposed to replace Article 4 of the GATT Standards Code but this idea was modified to replace the entire disciplines for standards and put in an annex to the Agreement. The relevant documents regarding the issues are discussed below and summarized in <Table 15>.

Table 15. List of Uruguay Round negotiation documents for Code of Good Practice

Date	Document Number	Title of the Document
13/11/1985	TBT/23	SECOND THREE-YEAR REVIEW OF THE OPERATION AND IMPLEMENTATION OF THE AGREEMENT
06/02/1986	TBT/M/20	MINUTES OF THE MEETING HELD ON 31 OCTOBER – 1 NOVEMBER 1985 – Chairman: Dr. B.N. Singh
15/09/1987	MTN.GNG/NG8/W/8	COMMUNICATION FROM THE EUROPEAN ECONOMIC COMMUNITY
26/02/1988	MTN.GNG/NG8/W/25	AGREEMENT ON TECHNICAL BARRIERS TO TRADE: ASPECTS OF THE AGREEMENT PROPOSED FOR NEGOTIATION – Note by the Secretariat
07/07/1988	TBT/W/110	A CODE OF GOOD PRACTICE FOR NON-GOVERNMENTAL BODIES IN THE AGREEMENT ON TECHNICAL BARRIERS TO TRADE – Proposal by the European Economic Community
17/07/1989	TBT/W/124	CODE OF GOOD PRACTICE FOR NON-GOVERNMENTAL STANDARDIZING BODIES – Proposal by the European Economic Community
15/02/1990	TBT/W/137	CODE OF GOOD PRACTICE FOR THE PREPARATION, ADOPTION AND APPLICATION OF STANDARDS – Revised Proposal by the European Economic Community
15/06/	TBT/W/146	FEASIBILITY OF IMPLEMENTING THE CODE OF

1990		GOOD PRACTICE FOR THE PREPARATION, ADOPTION AND APPLICATION OF STANDARDS IN THE AGREEMENT ON TECHNICAL BARRIERS TO TRADE – Communication from the ISO Central Secretariat
03/07/1992	TBT/W/158	GATT SECRETARIAT PARTICIPATION IN AN AD HOC ISO/IEC MEETING ON THE ISO/IEC CODE OF GOOD PRACTICE FOR STANDARDIZATION, GENEVA, 22 MAY 1992 – Note by the Secretariat

4.5.3.1 An initial proposal by the EC for the Code of Good Practice for Non-Governmental Standardizing Bodies

At the second three-year review of the operation and implementation of the Agreement after the conclusion of the Tokyo Round Standards Code, the Code's parties have presented their views to improve the regime. During the Tokyo Round negotiations, there had been significant concerns about unbalancing legal effect of the Standards Code between countries with centralized standardization system and those with federalized or fragmented standardization system. The experience in the early several years of the Agreement's operation proved that those concerns were real and significant. Especially, the EEC believed that there was an urgent need to address the issue which lacks reciprocity.

The EC noted that Parties in which the central government had only limited responsibilities in standards activities, the implementation of the Agreement's obligation was found to be less burdensome than in Parties with highly centralized standards system. Moreover, the EC emphasized that the activity of private standards organizations was becoming increasingly important, as many governments were changing their policies to prefer market-led standardization to government-led standardization.

On this background, the EEC submitted two suggestions to improve operation of the Agreement, including implementation by local and private standardization bodies in particular. Those two ideas were "(1) the possible extension to local government bodies of all major obligations under the Agreement; and (2) the establishment of a "code of good practice" for non-governmental standardizing bodies".²⁹³ The latter idea is represented in <Figure 12>.

²⁹³ TBT/23, p. 1.

Figure 12. Initial proposal for Code of Good Practice replacing Article 4

	Technical regulation	Standards
Central government bodies	Article 2 Preparation, adoption and application of technical regulations and standards by central government bodies	
Local government bodies	Article 3 Preparation, adoption and application of technical regulations and standards by local government bodies	
Non-government bodies	Article 4 Preparation, adoption and application of technical regulations and standards by non-government bodies	

➔ Code of Good Practice for Non-Governmental Standardizing Bodies

Source: Author's analysis

With the suggestion, the EEC explained that the purpose of establishing a code of good practice was “to make the obligations already laid down in Article 4, 6 and 8 of the Agreement more concrete, and to provide some yardstick by which the performance of both Parties and private bodies could be measured.”²⁹⁴ Article 4 provides for preparation, adoption and application of technical regulations and standards by non-government bodies; Article 6 for determination by local government bodies and non-governmental bodies of conformity with technical regulations or standards; Article 8 for certification systems operated by local government and non-governmental bodies. Then, its idea was to take a “best effort”

²⁹⁴ TBT/23, p. 2.

approach when obliging those private bodies to voluntarily accept and abide by the code of good practice. Thus, it presented its idea, stating, '[p]arties could be obliged to take all reasonable measures to persuade private bodies to adhere to a voluntary code of good practice'.

At this stage, the EEC had only a general idea about the format and contents of the code of good practice. It suggested that the Committee might draft the code by including already existing obligations like transparency, non-discrimination but "in a more detailed or practical form".²⁹⁵ As part of obligation, the EEC considered it useful to extend the obligation of GATT notification to draft standard in drafting a code of good practice. In addition, it provided an idea that Parties should also notify to the GATT the names of the private standardization bodies which committed to accept the code of good practice.

The EC's idea of inserting a code of good practice for non-government bodies was proposed during the Uruguay Round negotiation.²⁹⁶ The Committee confirms the EC's idea and need of such a code by saying that the aim of the proposed code was "to ensure that [non-governmental standardizing] bodies comply with the basic obligations of the Agreement while taking into account the fact that only central governments have accepted obligations under the Agreement". The stated goal contains two factors: the first message is that the primary objective of having a code of good practice was to ensure implementation of non-government standardizing bodies; and second is that the reach of the obligation was only limited to central governments. To deal with the latter limitation, the Committee considered a "best effort" approach as well as Parties' full responsibility for implement under the dispute settlement procedures. The Committee, thus, describes,

"Parties are therefore required to "take such reasonable measures as may be available to them to ensure" that [non-governmental] bodies comply with the relevant provisions of the Agreement. Article 14.24 enables a Party to invoke the dispute settlement procedures in cases where it considers that its trade interests are significantly affected by another Party's failure to achieve satisfactory results under Article 4, 6 and 8."²⁹⁷ In addition, the Committee described the EC's proposal to require non-government bodies to notify their proposed

²⁹⁵ TBT/23, p. 2.

²⁹⁶ MTN.GNG/NG8/W/25, pp. 3-4.

²⁹⁷ MTN.GNG/NG8/W/25, para. 7.

technical regulations and rules of certification. It confirmed that Parties were not required for non-government bodies' such notification under the exemptions in Article 4.1 and 8.1 but that non-government bodies were obliged for other transparency procedures such as provision of a copy and information, comments and discussion under the respective Article as well as general obligation for information under Article 10.1 and 10.2.²⁹⁸

After making an initial proposal for the Uruguay Round negotiation, the EC provided further studies on a possibility of and need for inserting a code of good practice as an annex to the Agreement. According to a subsequent proposal made by the EEC, there were generally three reasons for why a code of good practice was desirable.²⁹⁹ First, it emphasized equally significant trade barrier effects from standards by non-governmental bodies to those caused by standards by government bodies. It noted that when standards and technical regulations established by non-government bodies are used on a nation-wide basis, they can, in practice, create no less serious trade barriers.³⁰⁰ Second, it pointed out a world-wide shift towards a greater use of standards and technical regulations drawn up by non-governmental bodies and a lesser use of standards and technical regulations drawn up by central government bodies.³⁰¹ Last, it noted lack of successful functioning of the Agreement in terms of transparency in activities by non-government bodies. The EEC explained such lack of success based on three probable factors: (i) insufficient incentives both for non-government bodies and Parties to achieve full implementation; (ii) insufficiently strict or elaborate substantive requirements; and (iii) not very practical, operation or even relevant for non-governmental bodies since the substantive obligations are primarily those of Parties, and then applied to non-governmental bodies.³⁰²

Overall, the EC pinpointed that the most fundamental problem of the rules in the Agreement lied in the indirect compliance mechanism based on the language that Parties were obliged to "take such reasonable measures as may be available to them to ensure" non-government bodies' implementation. It explained that the 'best effort' or 'second level' operation was a main cause for the ineffective operation:

²⁹⁸ MTN.GNG/NG8/W/25, para. 8.

²⁹⁹ See TBT/W/110.

³⁰⁰ TBT/W/110, p. 1.

³⁰¹ TBT/W/110, p. 1.

³⁰² TBT/W/110, p. 2.

“As a result, the “best effort” obligations of the Agreement have by and large remained a dead letter. This has worked to the disadvantage of Parties where central government bodies have an important role in standardization, testing and certification and to the advantage of Parties where other factors play an important role. It has also limited the relevance of the Agreement in preventing or eliminating technical barriers to trade. By covering other bodies than central government bodies, the Agreement implicitly recognizes that those other bodies can, and in practice sometimes do, create problems for imported products.”³⁰³

Specifically, the EC described that bodies other than central government bodies were not aware of the extent that they were already covered by the Agreement, and, even if they knew that they were covered, they had difficulty figuring out precise operational rules. It further noted that obligation of central government was not always applicable to or relevant for other standardizing bodies.³⁰⁴

Accordingly, the EC strongly proposed to establish a code of good practice in the Agreement. It firmly believed that the approach would be “the most realistic and logical way of dealing with important “best effort” level obligations”.³⁰⁵ It explained that the advantage of a code was that it would “directly address[] the actors concerned and stipulate a number of clear, practical and relevant principles of good practice for them to follow”.³⁰⁶

The EC proposed that the scope of a code of good practice be extensive enough to cover not only standards but also technical regulations, pre-standards, conformity procedures and certification systems, and those of non-governmental bodies both at national, local, or regional levels, not to mention private level.³⁰⁷

Also, it proposed to revise Article 4 by replacing it with provisions as shown in <Box 11>.

³⁰³ See TBT/W/124.

³⁰⁴ TBT/W/124, p. 1.

³⁰⁵ TBT/W/124, p. 2.

³⁰⁶ TBT/W/124, p. 2.

³⁰⁷ TBT/W/110, p. 2.

Box 15. Uruguay Round - EC's initially proposal to replace Article 4 by a code

Article 4

Preparation, adoption and application of standards by non-governmental bodies

4.1 Parties shall take such reasonable measures as may be available to them to ensure that non-governmental standardizing bodies within their territory as well as non-governmental regional standardizing bodies of which one or more of their non-governmental standardizing bodies are member, accept and comply with the code of good practice for non-governmental standardizing bodies in annex 4 to this Agreement. In addition, Parties shall not take measures which have the effect of, directly or indirectly, requiring or encouraging non-governmental standardizing bodies to act in a manner inconsistent with the code of good practice in annex 4.

4.2 As soon as possible after a non-governmental standardizing body within their territory or a non-governmental regional standardizing body of which one or more of their non-governmental standardizing bodies are member, has accepted or withdrawn from the code of good practice in annex 4, Parties shall notify other Parties through the GATT secretariat of this fact, except to the extent that the non-governmental regional standardizing body has fulfilled this obligation. The notification shall include the name and address of the body concerned and the products covered by its current and expected standardization activities.

* New or revised phrases are underlined by author.

The proposed provisions required Parties to put “best effort” in ensuring acceptance and compliance by non-governmental standardizing bodies and non-governmental regional standardizing bodies of the code of good practice annexed to the Agreement.³⁰⁸ The rest of the provisions are basically identical with the corresponding provisions in the Tokyo Round Standards Code.

Then, the EC also suggested a draft code. The EC proposed to make acceptance of the code voluntary. Even though the code was operated on a voluntary basis, the EC had the view that the code would be “self-reinforcing, by denying certain benefits to non-parties” and “self-policing, by granting other parties the right to comment and lodge complaints”.³⁰⁹

Thus, an idea of inserting a code of good practice which was intended to exclusively deal with standards and technical regulations by non-governmental bodies was proposed so that implementation by non-governmental bodies could be better guided and fulfilled. At this early stage, the primary purpose of establishing a separate voluntary code was to identify

³⁰⁸ TBT/W/124, pp. 2-3.

³⁰⁹ TBT/W/124, p. 2.

which non-governmental bodies were subject to the operation of the TBT regime and therefore, the Parties were asked to notify those non-governmental standardization bodies which would voluntarily accept the code. Also, the code was intended to provide non-governmental standardization bodies with concrete and more practical obligations to follow so that they could more easily understand the rules under the TBT regime.

The EC proposal was discussed at meetings of the TBT Committee in September and November 1989. Many Parties agreed to the proposal. In particular, the Parties were supportive of the ideas of directly addressing non-government standardizing bodies with a more clear rules through a voluntary code of good practice. In addition, they responded positively toward the suggestions of introducing a regular monitoring system on a governmental level in the Committee, establishing transparency in the activities of non-governmental standardizing bodies through multiple instruments like provision of information upon request, use of open standardization procedures based on comments and responses, the use of the ISONET network, requirements of using international standards as a basis and active participation in international standardization and stimulation of coordination between standardizing bodies within the national territory.³¹⁰

4.5.3.2 A revised proposal for the Code of Good Practice for Standards

During the negotiations in September and November 1989, the Parties commented on several aspects of the EC's draft code of good practice, upon which the EC subsequently provided a revised proposal of the code.³¹¹ One of the major revision proposals was made to the coverage of the proposed code, which resulted in some reshuffles of the regulatory structure of the TBT Agreement as well as an expansion of the scope of the Code. Other proposals were related to improve the transparency of the work programmes of standardizing bodies, to insert general provisions for definitions, membership, and notification procedures in the code, and to include development concerns as legitimate reasons for deviating from international standards.³¹²

³¹⁰ See TBT/W/137.

³¹¹ TBT/W/137, p. 8-10.

³¹² TBT/W/137, p. 2-3.

The most important revision was made as regards to the scope of the Code. There were comments to change the scope of the code from addressing standards activities of non-governmental standardization bodies to dealing with standards by all standardizing bodies, whether governmental or non-governmental, local, national or regional. Accordingly, the EC not only revised the title and contents of the draft code but provided proposed revisions to relevant provisions of the Tokyo Round TBT Agreement. Among the proposals, the scopes of Article 2 and 3, in particular, were subject to amendments. For instance, all references to standards were removed from Article 2 and 3 of the Agreement and thus, provisions of Article 2 and 3 were left to exclusively deal with technical regulations by central government bodies and technical regulations by local and non-government bodies, respectively.³¹³

In the meantime, Article 4 was made to incorporate a larger scope than the previously proposed one, with the exclusion of technical regulations by non-governmental bodies but with the inclusion of all standards by central and local government bodies. As the scope of Article 4 was extended to standards of central and local government bodies, substantive requirements such as non-discrimination and prohibition of unnecessary obstacle were newly added and they were applied exclusively to standards prepared, adopted and applied by central governmental standardizing bodies. Also, compliance of the code of good practice was required with respect to central government standardizing bodies while compliance of it was required on the 'second best' level with respect to local and non-governmental standardizing bodies. These substantive changes in Article 4 of the revised proposal are represented in < Box 16>.

In sum, the proposed code of good practice was no longer a mere improvement of disciplines to replace Article 4 governing non-governmental standardizing bodies; rather, it was now designed to be a whole new set of rules and procedures addressing all voluntary standards, regardless of which entities have prepared, adopted, or applied them.

³¹³ TBT/W/137, p. 4-6.

Box 16. Uruguay Round - EC's revised proposal for amending Article 4 and the relevant parts in the February 1990 Draft

Article 4
Preparation, adoption and application of standards

4.1 With respect to their central government bodies Parties shall ensure that standards are not prepared, adopted or applied with a view to creating obstacles to international trade. Furthermore, products imported from the territory of any Party to the GATT Agreement on Technical Barriers to Trade shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country in relation to such standards. They shall likewise ensure that their standards themselves nor their application have the effect of creating unnecessary obstacles to international trade.

4.2 Parties shall ensure that their central government standardizing bodies accept and comply with the code of good practice for the preparation, adoption and application of standards in annex 4 to this Agreement. They shall take such reasonable measures as may be available to them to ensure that local government or non-governmental standardizing bodies within their territory as well as non-governmental regional standardizing bodies of which they or one or more bodies within their territory are member, accept and comply with this code of good practice. In addition, Parties shall not take measures which have the effect of, directly or indirectly, requiring or encouraging such standardizing bodies to act in a manner inconsistent with the code of good practice in annex 4.

4.3 As soon as possible after a body mentioned in Article 4.2 has accepted or withdrawn from the code of good practice in annex 4, Parties shall notify other Parties through the GATT secretariat of this fact, except in the case of a regional body, to the extent that the regional body has itself fulfilled this obligation. The notification shall include the name and address of the body concerned and the products covered by its current and expected standardization activities.

* New or revised phrases are underlined by author.

As a result, the distinction of technical regulations and standards under the regime became more important than before since such a distinction would determine an applicable set of rules and procedures. In other words, if a technical specification was determined to be a technical regulation, then either Article 2 or 3 would apply to it whereas if a technical specification was found to be a standard, then Article 4 and, to the extent that the subject standardization body had previously accepted the code, the code of good practice would apply.

Such a restructuring of the Agreement's regulatory structure, or the division of provisions for technical regulations and standards, also led to some subsequent amendments in the original text of the code of good practice.

Figure 13. Revised proposals for Code replacing the ‘standards’ disciplines

	Technical regulation	Standards	
Central government bodies	Article 2 Preparation, adoption and application of technical regulations and standards by central government bodies		Code of Good Practice for Non-Governmental Standardizing Bodies
Local government bodies	Article 3 Preparation, adoption and application of technical regulations and standards by local government bodies <i>and non-governmental bodies</i>		
Non-government bodies	Article 4 Preparation, adoption and application of technical regulations and standards by non-government bodies		

First, now that the code was to deal with all standards, a feasibility of implementing it from the standpoint of the standardization bodies concerned within the ISO/IEC system was considered. Therefore, the ISO Central Secretariat reviewed the revised version of proposed code and concluded that the obligations in the code could be met without significant technical obstacles by the ISO/IEC system. Nevertheless, it had made a few suggestions to harmonize the code’s terminologies and phrases with those of the ISO/IEC system. For example, it suggested to change words “the product concerned” for “the subject matter covered” since standardization activities of standardizing bodies might be wider than standardization of products; it also suggested to change the term “national member body of ISONET” for the term “national member of ISONET” which was adopted in the ISONET Constitution; and it suggested to change the wording “the relevant product classification” for “the classification

number relevant to the subject matter”³¹⁴.

Box 17. Uruguay Round - EC's revised proposal for amending Article 4 and the relevant parts in the July 1990 Draft

Article 4

Preparation, adoption and application of standards

With respect to their central government bodies

4.1.1 Parties shall ensure that products imported from the territory of any other Party shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country in relation to such standards.

4.1.2 Parties shall ensure that standards are not prepared, adopted or applied with a view to creating obstacles to international trade. Parties shall likewise ensure that neither standards themselves nor their application have the effect of creating unnecessary obstacles to international trade. In doing so, Parties shall comply with the provisions of Article 2, sub-paragraphs 1.2.1 to 1.2.6.³¹⁵

4.2 Parties shall ensure that their central government standardizing bodies accept and comply with the code of good practice for the preparation, adoption and application of standards in annex 4 to this Agreement. They shall take such reasonable measures as may be available to them to ensure that local government or non-governmental standardizing bodies within their territory as well as regional standardizing bodies of which they or one or more bodies within their territory are member, accept and comply with this code of good practice. In addition, Parties shall not take measures which have the effect of, directly or indirectly, requiring or encouraging such standardizing bodies to act in a manner inconsistent with the code of good practice in annex 4.

4.3 As soon as possible after a body mentioned in Article 4.2 has accepted or withdrawn from the code of good practice in annex 4, Parties shall notify other Parties through the GATT secretariat of this fact, except in the case of a regional body, to the extent that the regional body has itself fulfilled this obligation. The notification shall include the name and address of the body concerned and the products covered by its current and expected standardization activities.

* New or revised phrases are underlined by author.

With respect to the cost of implementing the code of good practice, the ISO Central

³¹⁴ TBT/W/146, pp. 1-2.

³¹⁵ These numbers are probably mistakenly put. The referred numbers of sub-paragraphs of Article 2 would be more appropriate if they were from “2.2.1 to 2.2.6”, rather than “1.2.1 to 1.2.6”. The relevant sub-paragraphs provide elaborated obligations for “unnecessary obstacles to international trade”.

Secretariat suggested that there should be a more thorough study since the costs for adjusting and publishing their work programmes by standardizing bodies which had accepted the Code would depend on their respective structures and volume of work and, therefore, the costs have to be assessed by individual standardizing bodies themselves.³¹⁶

Following intensive discussions and responding to the ISO's feasibility review of the proposed code of good practice, the GATT drafters submitted a revised version of the code in July 1990.³¹⁷ In that version of the code, some terminologies and concepts were changed as the ISO had suggested and more detailed obligations were added for contents of notification.³¹⁸ In addition, "all interested parties in other Parties" were allowed to make comments in writing, which standardizing bodies shall discuss and take them and results of the discussion into account.³¹⁹ Furthermore, it was proposed to give companies of Parties the same right of participation in regional bodies or system as any other companies participating in those bodies or system. The exact paragraph reads, "[c]ompanies established or incorporated in the territories of Parties shall be accorded the right of participation in regional bodies or systems in the same manner as it is accorded to any other companies participating in those bodies or systems".³²⁰

Second, the original provisions of Article 4 in the Tokyo Round TBT Agreement went through several amendments as its scope had been expanded to all standards, whether governmental or non-governmental. In the text of July 1990 Draft TBT Agreement, Article 4 contains three provisions. Provisions of the paragraph 1 are applied only with respect to central government bodies; they generally provide for non-discrimination principles and prohibition of unnecessary obstacles to international trade. However, unlike the previous February 1990 Draft, non-discrimination principles and prohibition of unnecessary obstacles were respectively put in separate sub-paragraphs, sub-paragraphs 1.1 and 1.2. Furthermore, the sub-paragraph 1.2 makes references to the corresponding provision of Article 2, providing more elaborated obligations in implementing least-trade-restrictiveness principle. Paragraph

³¹⁶ TBT/W/146, p. 4.

³¹⁷ See MTN.GNG/NG8/W/83/Add.3 and MTN.GNG/NG8/W/83/Add.3/Corr.1.

³¹⁸ MTN.GNG/NG8/W/83/Add.3/Corr.1, pp. 48-51.

³¹⁹ TBT/W/146, p. 50.

³²⁰ TBT/W/146, p. 51.

2 of Article 4 rules for mandatory compliance by central government standardizing bodies of the code of good practice in annex 4 and “best effort” level of compliance by local and non-government standardizing bodies, which were unchanged from the previous version.

4.5.3.3 The final version of the Code of Good Practice for the Preparation, Adoption and Application of Standards

The July 1990 Draft was an outcome of very hard work over the past several years and successfully had been based on a large agreement among the negotiating Parties. To the Group’s surprise and disappointment, the US submitted at the July meeting of the Negotiating Group 8 in 1990, only six weeks before the finalization deadline, a draft proposal which contained several aspects entirely different from the July 1990 Draft and the “philosophy” that went against spirit of the previous negotiations.³²¹

In specific, the US had made proposal generally to strengthen second-level obligations with regard to regional and national standardizing bodies alike. In other words, it proposed basically to abolish any obligation with respect to national bodies, whether the government or their bodies themselves; at the same time, it suggested to impose a binding obligation on government to ensure that private, non-governmental regional bodies “comply with a whole set of new and very far-reaching obligations” with respect to regional bodies.³²²

The negotiating Group considered the US proposal as “a major backward and against the spirit, if not the letter, of Punta del Este” and foresaw even worsening imbalance between the Parties, reporting,

“This created a fundamental and unacceptable imbalance in rights and obligations, in the sense that there would be no obligation whatsoever for the more than six hundred standardizing bodies in the United States on the one hand, and extremely stringent first-level obligations for the European regional bodies on the other hand. This would, at the same time,

³²¹ MTN.GNG/NG8/W/84, p. 1. The original text of the proposal made by the US is not available.

³²² MTN.GNG/NG8/W/84, p. 2.

represent a fundamental legal inconsistency, in the sense that a government would have no obligations toward a given national body for its national activities, but first-level obligations toward exactly the same body as a member of a regional organization.”³²³

However, the US was determined in pushing forward its proposal. It firmly stated that the US had long opposed the EEC’s proposal for inserting a code of good practice, and its opposition basically stemmed from expected inability to implement the code and such inability was resulted from the domestic standardization system in which the US could not prescribe acceptance by private standardizing bodies.³²⁴ In conclusion, the US urged continued constructive dialogue in informal consultations and strongly expressed its unwillingness to approve the current draft.³²⁵

The conflict between the EC and the US with respect to the proposed insertion of the code of good practice was eventually resolved through subsequent informal meetings. After continued discussions in series of informal meetings, - meetings on 18-20 September, 8-10 October, and 17-18 October - the Negotiating Group finally reached agreement on most of the issues on the table. The remaining issued included obligations of Articles 3 and 7 with respect to the activities of local government bodies, Article 14 on dispute settlement procedures, the relation of the TBT Agreement to the forthcoming SPS Agreement and the final provisions of Article 15.³²⁶

4.6 Chapter Summary and Partial Conclusion

This chapter concentrated on the conceptual development of ‘standard’ during the past

³²³ MTN.GNG/NG8/W/84, p. 2, second paragraph.

³²⁴ MTN.GNG/NG8/W/84, p. 2, fifth paragraph.

³²⁵ MTN.GNG/NG8/W/84, p. 3, first paragraph.

³²⁶ MTN.GNG/NG8/W/83/Add.3/Rev.1, p. 1.

negotiation history of the GATT/WTO. It first reviewed the very early discussions over the concept and the coverage of ‘standard’ during the drafting period of the Standards Code right after the Kennedy Round. Then, it moved on to examine the rigorous conceptualization process during the Tokyo Round, including discussion over applicability of the Agreement to various subject matters like SPS measures, health and sanitary regulations, labeling, packaging and marks of origin. It traced how the overall coverage of “standard” (the entire subject matter) was finally determined, and how the concept of ‘standard’ (one of the subject matters) was developed and harmonized with the ISO/ECE normative definitions. Then, the chapter analyzed the concept of ‘standard’ – its definition, regulatory scope and disciplines in major draft Standards Codes. Finally, it reviewed the negotiation for inserting the Code of Good Practice annexed to the TBT Agreement during the Uruguay Round.

The analysis of this chapter primarily shows that the concept of “standards” went through substantial changes over the past several decades of negotiation and revision. In particular, the concept of “standard” has long developed in line with the concept of “technical regulations” and the former’s relation with the latter experienced significant alterations until the WTO TBT Agreement was adopted.

One of the major findings of this chapter’s analysis shows that the requirement of voluntary compliance which strictly depended on legal criteria, such as existence of legal basis and evidence of legal enactment and legal enforcement in the past drafts, has evolved to be defined in more general term and become ambiguous on this legal criteria in the current TBT Agreement. In addition, the concept of ‘standard’ which could be largely confirmed by its non-governmental standards body in previous drafts has now been changed in such a way that it can be adopted or applied by both governmental and non-governmental standards bodies and, thus, the factor of standards body has no longer a critical implication for its concept. Moreover, the analysis finds that the treatment of ‘standard’ was almost equivalent to that of ‘technical regulation’ in the earlier drafts and the final version of the GATT Standards Code; but revisions during the Uruguay Round have led to a result in which the current TBT Agreement establishes relatively indirect and less strict disciplines for ‘standards’.

The ambiguous distinction between ‘standards’ and ‘technical regulations’, in itself, creates a serious loophole in the operation of the TBT Agreement. Unlike the GATT Standards Code which treated “standards” almost equivalently as “technical regulations” except for a

few transparency obligations, the current TBT regime's treatment of 'standards' is more apparently different from its treatment of 'technical regulations'. This legal consequence makes the loophole even more serious.

These findings altogether imply that the multilateral trading system's treatment of 'standard' has become more general and less direct, which potentially causes increasing uncertainty in the interpretation of the definition and less effectiveness in pressuring the Agreement's implementation. The potential ineffectiveness of the Agreement may be a legal and regulatory problem but generally provided definition of 'standard' probably allows more flexible application of the concept 'standard'.

In sum, the concept of "standard" has developed to incorporate a wider scope. At the same time, the distinction between 'standard' and 'technical regulation' has evolved to be more ambiguous. Now that the disciplines for "standards" became relatively lax and indirect compared to the disciplines for 'technical regulations', it may be possible to lean on the flexibility in the concept of 'standard' and ambiguity in the distinction between 'standard' and 'technical regulation', and interpret the legal criterion of "voluntary/mandatory" compliance in a way to enlarge scope of 'technical regulation' in order to expand the practically effective application of the TBT Agreement.

Table 16. Comparison of different versions of Code of Good Practice

Obligations	Original Code of Good Practice (TBT/W/124, 27/07/1989)	Final Code of Good Practice (MTN.GNG/NG8/W/83/Add.3/Rev.1)
Non-discrimination	--	D. In respect of standards, the standardizing body shall accord treatment to products originating in the territory of any other Party to the GATT Agreement on Technical Barriers to Trade no less favourable than that accorded to like products of national origin and to like products originating in any other country.
Prohibition of unnecessary obstacles	--	E. The standardizing body shall ensure that standards are not prepared, adopted or applied with a view, to or with the effect of, creating unnecessary obstacles to international trade.
Use of international standards as a basis	A. Where standards are required and international standards exist or their completion is imminent, non-governmental standardizing bodies shall use them, or the relevant parts of them, as a basis for the standards they develop, except where such international standards or relevant parts are inappropriate for inter alia such reasons as the <u>prevention of deceptive practices; protection for human health or safety, animal or plant life or health, or the environment</u> ; fundamental climatic or other geographical factors; fundamental technological problems.	F. Where international standards exist or their completion is imminent, the standardizing body shall use them, or the relevant parts of them as a basis for the standards it develops, except where such international standards or relevant parts would be ineffective or inappropriate for instance, because of an insufficient level of protection or fundamental climatic or geographical factors or fundamental technological problems.
Participation in international standardization	B. with a view to harmonizing standards on as wide a basis as possible, non-governmental standardizing bodies shall, in an appropriate way, play a full part within the limits of their resources in the preparation by appropriate international standardizing bodies of international standards for products for which they either have adopted, or expect to adopt, standards. For non-governmental standardizing bodies on a national or local level, participation in a particular	G. With a view to harmonizing standards on as wide a basis as possible, the standardizing body shall, in an appropriate way, play a full part within the limits of its resources in the preparation by relevant international standardizing bodies of international standards regarding subject matter for which it either has adopted, or expects to adopt, standards. For standardizing bodies within the territory of a Party, participation in a particular international standardization activity shall, whenever possible, take place through one

	international standardization activity shall, whenever possible, take place through one delegation representing all non-governmental standardizing bodies in the national territory that have adopted, or expect to adopt, standards for the products to which the international standardization activity relates.	delegation representing all standardizing bodies in the territory that have adopted, or expect to adopt, standards for the subject matter to which the international standardization activity relates.
Membership in ISONET	C. Non-governmental standardizing bodies shall make every effort towards the establishment of, and their association with a member body of ISONET on the national territory or the regional level and towards the acquisition by this member body of the most advanced membership type possible.	K. The national member of ISO/IEC shall make every effort to become a member of ISONET or to appoint another body to become a member as well as to acquire the most advanced membership type possible for the ISONET member. Other standardizing bodies shall make every effort to associate themselves with the ISONET member.
Avoidance with duplication or overlap and standards based on a national consensus	D. Non-governmental standardizing bodies on a local or national level shall make every effort to avoid duplication of or overlap with the work of other non-governmental standardizing bodies on the national territory or with the work of non-governmental regional standardizing bodies which covers the national territory. They shall also make every effort to achieve a national consensus on the standards they develop and on the comments they make under paragraph I.	H. The standardizing body within the territory of a Party shall make every effort to avoid duplication of, or overlap with, the work of other standardizing bodies in the national territory or with the work of relevant international or regional standardizing bodies. They shall also make every effort to achieve a national consensus on the standards they develop. Likewise the regional standardizing body shall make every effort to avoid duplication of, or overlap with, the work of relevant international standardizing bodies.
Performance rather than design	E. Wherever appropriate, non-governmental standardizing bodies shall specify standards in terms of performance rather than design or descriptive characteristics.	I. Wherever appropriate, the standardizing bodies shall specify standards based on product requirements in terms of performance rather than design or descriptive characteristics.
	F. Each year, non-governmental standardizing bodies shall publish a work programme. After six months, this work programme shall be updated. Both the annual work programme and the update shall be published in a national or, as the case may be, regional publication of standardization activities. If the text of the publication is not in English, French or Spanish, an identical version in one of those	J. At least once every six months, the standardizing body shall publish a work programme containing its name and address, the standards it is currently preparing and the standards which it has adopted in the preceding period. A standard is under preparation from the moment a decision has been taken to develop a standard until that standard has been adopted. The titles of specific draft standards shall, upon request, be provided in English, French or Spanish. A notice of the

	<p>languages shall be added. The publication shall include an indication that all interested parties in Parties to the GATT Agreement on Technical Barriers to Trade may request that a copy of the text of any individual draft standard in the annual work programme or, as the case may be, the update be sent to them at the start of the public inquiry for that standard. No later than the time of publication of the annual work programme or update, nongovernmental standardizing bodies on a national or local level shall transmit the same information to ISONET via the national member body of ISONET. Non-governmental standardizing bodies on a regional level shall transmit this Information to ISONET either via an international affiliate of ISONET or via one or more national member bodies of ISONET.</p>	<p>existence of the work programme shall be published in a national or, as the case may be, regional publication of standardization activities.</p> <p>The work programme shall for each standard indicate, in accordance with any ISONET rules, the classification relevant to the subject matter, the stage attained in the standard's development, and the references of any international standards taken as a basis. No later than at the time of publication of its work programme, the standardizing body shall notify the existence thereof to the ISO/IEC Information Centre in Geneva.</p> <p>The notification shall contain the name and address of the standardizing body, the name and issue of the publication in which the work programme is published, the period to which the work programme applies, its price (if any), and how and where it can be obtained. The notification may be sent directly to the ISO/IEC Information Centre, or, preferably, through the relevant national member or international affiliate of ISONET, as appropriate.</p>
	<p>G. Before adopting a standard, non-governmental standardizing bodies shall hold a public inquiry of at least 60 days on the draft standard. No later than the start of this public inquiry, nongovernmental standardizing bodies shall publish a notice announcing the period of the public inquiry on the draft standard concerned in a national or, as the case may be, regional publication of standardization activities. If the text of the notice is not in English, French or Spanish, an identical version in one of those languages shall be added. The notice shall include an indication that all Interested parties In Parties to the GATT Agreement on Technical Barriers to Trade may request that a copy of the draft standard be sent to them. No later than the time of publication</p>	<p>L. Before adopting a standard, the standardizing body shall allow a period of at least sixty days for the submission of comments on the draft standard by interested parties in a Party to the GATT Agreement on Technical Barriers to Trade. This period may, however, be shortened in cases where urgent problems of safety, health or environment arise or threaten to arise. No later than at the start of the comment period, the standardizing body shall publish a notice announcing the period for commenting in the publication referred to in paragraph J. Such notification shall include, as far as practicable, whether the draft standard deviates from relevant international standards.</p>

	of the notice, non-governmental standardizing bodies on a national or local level shall transmit the same information to ISONET via the national member body of ISONET. Non-governmental standardizing bodies on a regional level shall transmit this information to ISONET either via an international affiliate of ISONET or via one or more national member bodies of ISONET.	
	H. Any interested party in a Party to the GATT Agreement on Technical Barriers to Trade is entitled to receive the text which it has requested of a draft standard submitted to public inquiry. Copies of such drafts will be sent by airmail or other speedy means of delivery at the start of the public inquiry or, if the request has been received after the start but before the end of the public inquiry, as promptly as possible. For this service a reasonable fee may be charged, which shall, apart from the real costs of delivery be the same for domestic and foreign parties.	(The corresponding provisions would be paragraphs M and P)
	I. Non-governmental standardizing bodies shall take comments on their draft standards into account whenever those comments have been received during the period of public inquiry, and originate from non-governmental standardizing bodies that have accepted this code of good practice. Such comments shall be replied to as promptly as possible. Non-governmental standardizing bodies shall make an objective effort to resolve dissenting viewpoints. Where such a comment contests a proposed deviation from an international standard, it is up to the non-governmental standardizing body that has prepared the draft standard to explain why that deviation is necessary for a legitimate objective such as mentioned in paragraph A.	N. The standardizing body shall take into account, in the further processing of the standard, the comments received during the period for commenting. Comments received through standardizing bodies that have accepted this code of good practice shall, if so requested, be replied to as promptly as possible. The reply shall include an explanation why a deviation from relevant international standards is necessary.

	J. Once the standard has been adopted, it shall be promptly published.	O. Once the standard has been adopted, it shall be promptly published.
	K. When a request is received from an interested party in a Party to the GATT Agreement on Technical Barriers to Trade for a copy of a standard which they produced, non-governmental standardizing bodies on a national or local level shall promptly provide that copy. Nongovernmental standardizing bodies on a regional level shall promptly provide the requested copy or information as to where it can be obtained. A reasonable fee may be charged for copies, which shall, apart from the real costs of delivery, be the same for foreign and domestic parties.	<p>M. On the request of any interested party in a Party to the GATT Agreement on Technical Barriers to Trade, the standardizing body shall promptly provide, or arrange to provide, a copy of a draft standard which it has submitted for comments. Any fees charged for this service shall, apart from the real cost of delivery, be the same for domestic and foreign parties.</p> <p>P. On the request of any interested party in a Party to the GATT Agreement on Technical Barriers to Trade, the standardizing body shall promptly provide, or arrange to provide, a copy of its most recent work programme or a standard which it produced. Any fees charged for this service shall, apart from the real cost of delivery, be the same for domestic and foreign parties.</p>
	L. Non-governmental standardizing bodies shall afford sympathetic consideration to and adequate opportunity for prompt consultation regarding complaints with respect to any of the good practices in this code whenever those complaints originate from non-governmental standardizing bodies that have accepted this code of good practice. They shall make an objective effort to resolve such complaints.	Q. The standardizing body shall afford sympathetic consideration to, and adequate opportunity for, consultation regarding representations with respect to the operation of this code presented by standardizing bodies that have accepted this code of good practice. It shall make an objective effort to solve any complaints.
	M. Non-governmental standardizing bodies shall notify their central government authorities or, in the case of a regional body, those of their members, as soon as possible of the fact that they have accepted or withdrawn from this code of good practice. The notification shall include the name and address of the body concerned and the products covered by its current and expected standardization activities. Non-governmental regional standardizing bodies may	C. Standardizing bodies that have accepted or withdrawn from this code shall notify this fact to the ISO/IEC Information Center in Geneva. The notification shall include the name and address of the body concerned and the scope of its current and expected standardization activities. The notification may be sent either directly to the ISO/IEC Information Centre, or through the national member body of ISO/IEC or, preferably, through the relevant national member or international affiliate of ISONET, as appropriate.

	alternatively make this notification to all Parties of the GATT Agreement on Technical Barriers to Trade via the GATT secretariat.	
--	--	--

Chapter 5. The Distinction between ‘Standard’ and ‘Technical Regulation’

5.1 Chapter Overview

‘Standard’ in the WTO TBT Agreement has a different fate than ‘technical regulation’. The former is subject to rather general obligations which are, in principle, conditionally applied upon acceptance. On the contrary, the latter is subject to relatively specific obligations which are directly applied without any prior acceptance. Therefore, the distinction between ‘standard’ and ‘technical regulation’ is significantly critical in determining which set of obligations and rules are applied to a subject matter at issue. However, the WTO TBT Agreement contains a fundamentally inherent limitation in which legal elements applied to distinguishing ‘standard’ from ‘technical regulation’ is too general to provide concrete criteria.

The key legal element for the distinction is the criterion “voluntary/mandatory” compliance for ‘standard’ and ‘technical regulation’ respectively and, unfortunately, it is far from clear to grasp and apply in practice. For instance, the terms “voluntary” or “mandatory” can be perceived either from legal perspective or from economic perspective or from probably from both. To be specific, a “voluntary/mandatory” character in general can be judged by evidence of *ex ante* legal basis, enactment and/or enforcement or it can be judged by proof of *ex post* results or forces that make the compliance “voluntary” or “mandatory” or it can be judged by both factors in a causal link - which means existence of legal basis or some government actions as a cause and existence of their effect that forces certain compliance.

In fact, the vague concept of “voluntary/mandatory” compliance was one of the most

critical legal issues in recent *US-Tuna II* dispute. Views and arguments sharply divided regarding its interpretation. Therefore, the chapter plans to examine this key concept of “voluntary/mandatory” compliance perceived and interpreted in recent TBT disputes with a view to clarify the dividing line between ‘standard’ and ‘technical regulation’. In addition, it also reviews current interpretation and application of the concepts ‘standard’ and ‘technical regulation’. The analysis in this chapter not only examines legal interpretations by panels and the AB but also considers valuable views and arguments of the disputants because such discussions to clarify and establish the legal concept of “voluntary/mandatory” compliance are at a very early stage. The examination finally categorizes three basic approaches to interpret the concept of “voluntary/mandatory” compliance as found in the dispute and analyzes each of them.

5.2 Determination of a ‘Standard’

5.2.1 A context in which a ‘standard’ is determined in disputes

In disputes, the concept of “standards” has been interpreted and applied in the context of examining Article 2.4 of the TBT Agreement which requires Members to use relevant international standards as a basis for their technical regulations. The analysis of Article 2.4 in dispute is generally conducted based on three questions: (i) whether a standard submitted by a disputant is a “relevant international standard” or whether a relevant international standard exists; (ii) whether the relevant international standard is “used as basis for” the technical regulation at dispute; and (iii) whether the relevant international standard is an “ineffective or inappropriate means” for the fulfillment of the legitimate objectives pursued.

327

Then, the examination under the question whether a standard submitted by a disputant is a “relevant international standard” is further decomposed into three parts: (i) whether a document submitted by a disputant is a ‘standard’, (ii) whether it is an “international”

³²⁷ Panel report, *EC-Sardines*, paras. 7.61-7.139. Panel report, *US-Tuna*, para.7.625 and paras. 7.627-7.740.

standard, and (iii) whether it is “relevant” international standard within the meaning of the TBT Agreement.³²⁸ In this way, the meaning of ‘standard’ has been considered in disputes as a part of the concept “international standard” as used in Article 2.4.

However, the actual approach to determine a ‘standard’ constituting an “international standard” in *US-Tuna II* was different from that in *EC-Sardines*. In the following section, the different ways of examination and determination of an “international standard” are reviewed and analyzed.

5.2.2 The determination of a ‘standard’ in *EC-Sardines*

In *EC-Sardines*, the Panel interpreted that “international standards” are “standards that are developed by international bodies”. Accordingly, it reviewed, first, whether Codex Stan 94, which was submitted by the complainant as a “relevant international standard”, fell within the scope of the definition of ‘standard’ provided in Annex 1.2 of the TBT Agreement and, second, whether the Codex Alimentarius Commission was an international body within the meaning of Annex 1.2 of the TBT Agreement.³²⁹ The Panel’s interpretation of the term “international standard” was, thus, based on the definition of ‘standard’ as provided in Annex 1.2 of the TBT Agreement.

Then, the Panel referred to the definition of ‘standard’ in Annex 1.2 and noted that the meaning of the term ‘standard’ is composed of three major aspects: (i) it must provide “for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods”; (ii) compliance with it must not be mandatory; and (iii) it must be approved by a “recognized body”.³³⁰

The Panel, after setting out the criteria, did not enter into rigorous examinations on these legal elements. It only saw that there was no disagreement among the disputants and that there was no reason for it to disagree with the disputants’ position.³³¹ The parties to the dispute basically recognized the Codex Alimentarius Standard as an international “standard”

³²⁸ Panel report, *EC-Sardines*, paras. 7.61-7.99. Panel report, *US-Tuna*, paras. 7.630-7.707.

³²⁹ Panel report, *EC-Sardines*, para. 7.63.

³³⁰ Panel report, *EC-Sardines*, paras. 7.64-7.65.

³³¹ Panel report, *EC-Sardines*, para. 7.65.

because it contains “more than 200 standards” and these standards were developed by the Codex Commission, “an internationally recognized standard setting body”, and the Codex Standard at issue was “not mandatory”.³³²

Therefore, the Panel’s review in *EC-Sardines* was exclusively based on legal elements driven from the definition of ‘standard’ in Annex 1.2 of the TBT Agreement although it did not go through close examinations since there were not disputed issues in the case.

5.2.3 The determination of a ‘standard’ in *US-Tuna II*

In *US-Tuna II*, Mexico, the complainant argued that the AIDCP (Agreement on International Dolphin Conservation Program) Resolution to Adopt the Modified System for Tracking and Verification of Tuna is an international standard because “it provides rules expressly dealing with the characterization of tuna as dolphin-safe and non-dolphin safe”, which meets the first criterion; its compliance is not mandatory because it provides that “[a]pplication for the procedures for the use of the AIDCP Dolphin Safe Tuna Certificate shall be voluntary for each Party, especially in the event that they may be inconsistent with the national laws of a Party”, which fulfills the second; and “the AIDCP Standard was prepared and approved by the AIDCP member governments, which constitutes a recognized body”, which satisfies the third.³³³

However, the US argued that the definition of ‘dolphin-safe’ in the AIDCP tuna tracking resolution does not constitute a relevant international standard within the meaning of Article 2.4 of the TBT Agreement as it is not (i) a standard, (ii) international, or (iii) relevant. For the purpose of this study, the following passages only reviewed its argument regarding the question whether the AIDCP definition is a standard.

First, the US stated that the AIDCP standard “set[] out a definition for purpose of an intergovernmental agreement”, not “rules, guidelines or characteristics for products or related processes and production methods”.³³⁴ The US argued that the definition did not “itself establish any rules, guidelines or characteristics for products or their related processes and

³³² Panel report, *EC-Sardines*, paras. 4.26-4.27.

³³³ Panel report, *US-Tuna*, para. 7.633.

³³⁴ Panel report, *US-Tuna*, para. 7.638.

production methods, or aspects such as labeling and that the definition in the AIDCP resolution, simply defines a term.³³⁵ Second, the US argued that the AIDCP definition of “dolphin-safe” in the tuna tracking resolution was not “for common and repeated use” because it was drafted “for the specific purpose of defining a term in an international agreement” and that the AIDCP does not purport to establish a definition of “dolphin-safe” for application outside the context of the AIDCP resolutions.³³⁶ Third, it contended that the dolphin-safe definition in the AIDCP resolution was not contained in “a document approved by a ... body” because the resolution was approved by the parties to the AIDCP and “neither the AIDCP nor the parties to it constitute[d] a “body” (i.e. a “legal or administrative entity that has specific tasks and composition”)”. Furthermore, even if the AIDCP was a “body”, the US argued, it did not have recognized activities in standardization and therefore would not constitute a “recognized” body.³³⁷ Thus, the US tried to show that the AIDCP standard was not a ‘standard’.

After reviewing the arguments of the disputants, the Panel began its analysis by considering the meaning of the term “international standard”. It noted that the term “international standard” is not defined in Annex 1 of the TBT Agreement, but it noted that it is defined in the ISO/IEC Guide 2. It stated that, in the absence of a specific definition of a term in Annex, it should be understood to have the same meaning as in the ISO/IEC Guide 2. Accordingly, the Panel referred to the definition of “international standards” as provided in the ISO/IEC Guide 2.³³⁸ The Guide defines “international standard” as a “standard that is adopted by an international standardizing/standards organization and made available to the public”.

Based on the definition of “international standard” in the ISO/IEC Guide 2, the Panel viewed that an “international standard” is composed of three elements: “(i) a standard; (ii) adopted by an international standardizing/standards organization; and (iii) made available to the public”.³³⁹

The Panel first considered the meaning of “standard”. It noted that the term “standard” is

³³⁵ Panel report, *US-Tuna*, para. 7.638.

³³⁶ Panel report, *US-Tuna*, footnote 884.

³³⁷ Panel report, *US-Tuna*, para. 7.640.

³³⁸ Panel report, *US-Tuna*, para. 7.663.

³³⁹ Panel report, *US-Tuna*, para. 7.664.

defined both in Annex 1.2 to the TBT Agreement and in the ISO/IEC Guide 2 and that there exist some differences between them, which is also clearly stated in the Explanatory Note to Annex 1.2 of the TBT Agreement. Then, the Panel viewed that the term “standard” as used in the definition of an “international standard” in the ISO/IEC Guide 2 should be read in its proper context, which is “as it is defined in the ISO/IEC Guide itself”.³⁴⁰ However, it mentioned that the AB, in *EC-Sardines*, had confirmed that, according to the Chapeau of Annex 1, “the terms defined in Annex 1 should apply for the purpose of the TBT Agreement if these definitions depart from those in the ISO/IEC Guide 2”³⁴¹ Accordingly, the Panel made reference to the definition of ‘standard’ in the ISO/IEC Guide 2, but only to the extent that they are not differently provided in the definitions of Annex 1 in the TBT Agreement.

The Panel restated that the definition of “standard” in the Guide is a “document, established by consensus and approved by a recognized body that provides, for common and repeated use, rules, guidelines or characteristics for activities or their results, aimed at the achievement of the optimum degree of order in a given context”.³⁴² From the definition, it drew out two specific elements to examine and even additionally considered whether the subject international standard AIDCP resolution was based on consensus in spite of its recognition that it was not an element required for the purpose of the TBT Agreement.

In respect of the question whether the AIDCP resolution was “a document that provides rules, guidelines or characteristics”, the Panel found that its provisions were related to “the capture, unloading, storage, transfer and processing of tuna” and, therefore, it is such document for tuna fishing and tuna.³⁴³

Regarding the element of “for common and repeated use”, the Panel agreed with the US view that the ordinary meaning of “common” is “shared ... of general application” and of “repeated” is “frequent” and expressed its view that this component “would not be one that was drafted for the specific purpose of defining a term in an international agreement” but concerns “the general applicability of the rules, guidelines or characteristics therein provided. This in term has a bearing on the frequency of the use of such rules, guidelines or

³⁴⁰ Panel report, *US-Tuna*, para. 7.671.

³⁴¹ AB report, *EC-Sardines*, para. 224.

³⁴² Panel report, *US-Tuna*, para. 7.672.

³⁴³ Panel report, *US-Tuna*, para. 7.673.

characteristics.”³⁴⁴ Also, after examining the certification system under the AIDCP resolution, the Panel concluded that the AIDCP is a document which includes symbols, packaging, marking or labeling requirements.³⁴⁵

Thus, the Panel in *US-Tuna II* primarily referred to the definition of “international standard” in the ISO/ECE Guide and basically examined two criteria which are common in both definitions in the Guide and the Annex 1.2 of the Agreement. In this process, the Panel did not separately consider ‘standard’ criteria provided in Annex 1.2 of the Agreement.

5.2.4 A comparison of the two approaches for determining the concept ‘standard’ in disputes

The approach taken by the Panel in *US-Tuna II* was, in principle, significantly different from the approach taken by the Panel in *EC-Sardines*. First of all, the Panel in *US-Tuna II* interpreted the term ‘standard’ in the context of “international standard” defined in the ISO/IEC Guide 2 even though the term ‘standard’ is also defined in Annex of the TBT Agreement and the chapeau of the Annex implies that the terms in the TBT Agreement would override the corresponding terms in the ISO/ECE Guide 2 only to the extent that both definitions depart from each other.

Second, although the definition of “standard” in the Guide and the definition in Annex 1 of the TBT Agreement are largely identical to each other, they differed in some major aspects. Unlike the definition of the TBT Agreement, for instance, the definition of “standard” in the ISO/IEC Guide 2 additionally requires standards to be based on “consensus”. The Panel seems to have recognized this fact that consensus is not required for “standards” for the purpose of the TBT Agreement. Nevertheless, it proceeded to examine and subsequently confirmed that the subject international standard was based on consensus.

Third, the Panel in *US-Tuna II* did not examine whether compliance with the subject international standard was voluntary, as provided for in the definition of “standards” in Annex 1.2 of the TBT Agreement. In its conclusion that the AIDCP resolution constituted a

³⁴⁴ Panel report, *US-Tuna*, para. 7.674

³⁴⁵ Panel report, *US-Tuna*, para. 7.675.

“standard” for the purposes of Article 2.4 of the TBT Agreement, the Panel only summarized two reasons as evidence. Based on its finding that the AIDCP resolutions’ “dolphin-safe definition ... provide[d], for common and repeated use, rules, guidelines or characteristics for tuna fishing and tuna products...”, the Panel concluded that the AIDCP resolution was a ‘standard’.³⁴⁶ Based on this preliminary determination, the panel proceeded to review the next question of whether the standard constituted an “international standard” within the meaning of Article 2.4 of the TBT Agreement.

In conclusion, the approach taken by the Panel in *EC-Sardines* seems to be more appropriate because a determination of “international standard” should be based on examinations of both the term ‘standard’ and the term ‘international’ and an examination of the concept of ‘standard’ should be based on the criteria driven from Annex 1.2 of the TBT Agreement, rather than from the definition in ISO/ECE Guide.

5.3 Determination of a ‘Technical Regulation’

5.3.1 The three criteria driven from the definition of ‘technical regulation’

The determination of a certain specification as a ‘technical regulation’, ‘standard’ or ‘conformity assessment procedure’ leads to a finding on the applicability of the TBT Agreement to that specification at issue. In the disputes where disputants were fighting over a violation of provisions applied to ‘technical regulations’, the AB has confirmed that characterization of a certain measure as a ‘technical regulation’ is “a threshold issue because the outcome of the issue determines whether the TBT Agreement applicable”.³⁴⁷

In order to determine whether a disputed measures is a ‘technical regulation’ or not, panels have commonly considered the definition of ‘technical regulation’ provided in Annex 1.1 of

³⁴⁶ Panel report, *US-Tuna*, para. 7.677.

³⁴⁷ AB report, *EC-Asbestos*, para. 59. AB report, *EC-Sardines*, para. 175.

the TBT Agreement and drew out three criteria from the definition in order to follow in their examinations, which the AB subsequently affirmed as appropriate. The three criteria for this examination are such questions as (i) whether the document is applied to an identifiable product or group of products; (ii) whether the document lays down one or more characteristics of the product; and (iii) whether compliance with the product characteristics is mandatory.³⁴⁸ In this way, panels and the AB generally apply the definition and largely take a textual approach to determine a ‘technical regulation’ with a view to apply the TBT Agreement. Nevertheless, they pointed out that “the proper legal character of the measure at issue cannot be determined unless the measure [was] examined as a whole”.³⁴⁹

5.3.2 The criterion “identifiable product or group of products”

In *EC-Asbestos*, the AB elaborated the element “identifiable product or group of products”. It stated that a technical regulation must be applicable to an identifiable product or group of products otherwise enforcement of the regulation will be impossible.³⁵⁰ However, this does not mean that a measure at issue must expressly identify, name, or specify the product. The AB reasoned that nothing in the text of the TBT Agreement suggested that “those products need be named or otherwise expressly identified in a ‘technical regulation’.”³⁵¹ The AB also considered that there could be a ‘technical regulation’ which did not expressly identify products by name, but simply made them identifiable, for instance, through the ‘characteristic’ that was subject of regulation.³⁵²

Accordingly, the AB in the *EC-Asbestos* found that, even though it was true that the products to which the EC regulation’s prohibition applied could not be determined from the terms of the measure itself, the products covered by the measure were identifiable. It

³⁴⁸ AB report, *EC-Asbestos*, para. 67. Panel report, *US-Clove cigarette*, paras. 7.23-7.41.

³⁴⁹ AB report, *EC-Asbestos*, para. 64. AB report, *EC-Sardines*, para. 192.

³⁵⁰ AB report, *EC-Asbestos*, para. 70.

³⁵¹ AB report, *EC-Asbestos*, para. 70. The AB added, “[h]owever, in contrast to what the Panel suggested, this does not mean that a “technical regulation” must apply to “given” products which are actually named, identified, or specified in the regulation.”

³⁵² AB report, *EC-Asbestos*, para. 70. The AB added, that ‘the identifiable product or group of products need not be expressly specified in the document: the identified product coverage of a measure can also be determined according to the substance of the measure at issue.

observed that “all products must be asbestos free; any products containing asbestos are prohibited”.³⁵³

In *EC-Sardines*, the EC argued that the product covered by the EC regulation was limited to preserved *sardine philchardus* and the measure did not regulate preserved fish made from *sardinops sagax*; and, therefore, *sardinop sagax*, the product contended by the complainant was not an identifiable product under the EC measure.³⁵⁴ However, confirming the panel’s rejection to the claim, the AB explained that although the EC Regulation did not expressly identify *sardinops sagax*, this did not necessarily mean that it was not an identifiable product.³⁵⁵ It noted that the measure would be applicable to “a range of *identifiable* products beyond *sardina philchardus*” and since *sardinops sagax* was prohibited from being identified and marketed under an appellation including the term “sardines”, the EC measure was enforced against the species, which demonstrated that “preserved *sardinops sagax* [was] an *identifiable product* for the purpose of the EC Regulation”.³⁵⁶

In *US-Clove Cigarette*, the Panel observed that the measure at issue was explicitly identifying the products under its coverage, namely, cigarettes and any of their component parts.³⁵⁷ Unlike in *EC-Asbestos* case, the Panel noted that the titles of the US regulations and their relevant provisions consistently and expressly identified products they covered.

In *US-COOL*, the Panel observed that “[a]t first glance” the COOL statute explicitly defined “covered commodity” for country of origin labeling purposes as including “(i) muscle cuts of beef ... and pork” and “(ii) ground beef ... and ground pork”.³⁵⁸ In addition, the Panel went further to find out whether the COOL measure still satisfied the criterion if the actual products at dispute were livestock – cattle and hogs from which meat was produced. To the question, the Panel quoted the AB’s view in *EC-Sardines* that the products did not need to be expressly identified and that the requirement to identifiable products was related to aspects of compliance and enforcement.³⁵⁹ Similarly, the Panel reasoned that, in addition to the fact that the COOL measure identified *inter alia* beef and pork as part of the covered commodities,

³⁵³ AB report, *EC-Asbestos*, para. 72.

³⁵⁴ Panel report, *EC-Sardines*, para. 7.45.

³⁵⁵ AB report, *EC-Sardines*, para. 183.

³⁵⁶ AB report, *EC-Sardines*, para. 184-5.

³⁵⁷ Panel report, *US-Clove cigarettes*, para. 7.27.

³⁵⁸ Panel report, *US-COOL*, para. 7.202.

³⁵⁹ Panel report, *US-COOL*, para. 7.204. AB report, *EC-Sardines*, paras. 183-186 (original reference).

the labeling requirement under the COOL measure “[was] also applied to and thus enforceable against ‘[a]ny person engaged in the business of supplying a covered commodity to a retailer’”.³⁶⁰ In conclusion, the Panel found that the COOL measure applied to an identifiable product or group of products, namely “(i) beef and pork, either as muscle cuts or in ground form; and (ii) livestock (i.e. cattle and hogs), which were] the input products necessary to develop the beef and pork products explicitly covered by the COOL measure.”³⁶¹

In *US-Tuna II*, the Panel found that the US measure was specifically related to two types of goods, namely, tuna and tuna products. It observed that the US measure was regulating “‘tuna products’ containing ‘tuna’ that can be labeled as dolphin-safe”.³⁶² After the observation, it concluded that the US dolphin-safe labeling provisions applied to an “identifiable” product or group of products, that is, “tuna products” as defined in the measure.³⁶³

5.3.3 The criterion “lays down product characteristics”

The second criterion that the AB interpreted from the definition of technical regulations in *EC-Asbestos* was that the document “must lay down one or more characteristics of the product”.³⁶⁴ The AB interpreted the phrase “lay down” as “set forth, stipulate or provide”.³⁶⁵ It observed that the ordinary meaning of the word “characteristic” could be inferred from its synonyms such as “any objectively definable ‘features’, ‘qualities’, ‘attributes’ or other ‘distinguishing mark’ of a product”.³⁶⁶ It further noted that “[s]uch ‘characteristics’ might relate, *inter alia*, to a product’s composition, size, shape, colour, texture, hardness, tensile strength, flammability, conductivity, density, or viscosity”(emphasis in original reference)”.³⁶⁷ It also confirmed that the definition of a “technical regulation” in Annex 1.1 to the TBT Agreement lists examples of “product characteristics”, “terminology, symbols,

³⁶⁰ Panel report, *US-COOL*, para. 7.205.

³⁶¹ Panel report, *US-COOL*, para. 7.207.

³⁶² Panel report, *US-Tuna*, para. 7.60.

³⁶³ Panel report, *US-Tuna*, para. 7.62.

³⁶⁴ AB report, *EC-Asbestos*, paras. 66-70.

³⁶⁵ AB report, *EC-Asbestos*, para. 67.

³⁶⁶ AB report, *EC-Asbestos*, para. 67.

³⁶⁷ AB report, *EC-Asbestos*, para. 67.

packaging, marking or labeling requirements”.³⁶⁸ Then, the AB explained that these examples indicated that “product characteristics” included, “not only features and qualities intrinsic to the product itself, but also related “characteristics”, such as the means of identification, the presentation and the appearance of a product”.³⁶⁹

Based on the interpretation, the AB observed the EC measure imposed a prohibition on asbestos *fibres*, as such and this prohibition on these fibres “[did] not, *in itself*, prescribe or impose any “characteristics” on asbestos fire, but simply [banned] them in their natural state.”³⁷⁰ However, the AB further noted that the regulation of asbestos could only be achieved through the regulation of “products that contain asbestos fibres” and, therefore, “[a]n integral and essential aspect of the measure [was] the regulation of “products containing asbestos fibres” and thus, “although formulated negatively”, the measure was effectively prescribing or imposing certain objective “characteristics” on all products.³⁷¹ Accordingly, the AB, based on “the measure as an integrated whole”, concluded that the measure laid down “characteristics” for all products that might contain asbestos.³⁷²

The Panel in *EC-Sardines* noted the “comprehensive definition of “characteristics” of a product provided by the AB in *EC-Asbestos*, and found that the EC regulation was laying down certain product characteristics, “both intrinsic and related, that preserved sardines must possess in order for them to be “marketed as preserved sardines and under the trade description referred” to a certain provision of the EC Regulation.³⁷³ It observed that various provisions of the EC Regulation provided product characteristics that affected “composition, size, shape, colour and texture of preserved sardines”.³⁷⁴ Also, the Panel considered the requirement to use exclusively *sardina philchardus* was “a product characteristic as it objectively define[d] features and qualities of preserved sardines for the purpose of their ‘market[ing] as preserved sardines and under the trade description’” under the measure.³⁷⁵ Finally, it concluded that the measure at issue “in effect [laid] down product characteristics in

³⁶⁸ AB report, *EC-Asbestos*, para. 67.

³⁶⁹ AB report, *EC-Asbestos*, para. 67.

³⁷⁰ AB report, *EC-Asbestos*, para. 71.

³⁷¹ AB report, *EC-Asbestos*, para. 72.

³⁷² AB report, *EC-Asbestos*, para. 75.

³⁷³ Panel report, *EC-Sardines*, para. 7.26.

³⁷⁴ Panel report, *EC-Sardines*, para. 7.27.

³⁷⁵ Panel report, *EC-Sardines*, para. 7.27.

a negative form”.³⁷⁶

In *EC-Sardines*, it was appealed that the EC Regulation was regulation “naming” of a product, which was different from “labeling” requirement as explicitly stipulated in the definition of a technical regulation.³⁷⁷ However, the AB found it was not necessary to distinguish between “naming” and labeling because it was “irrelevant” to the second criterion. The AB viewed that the requirement to prepare a product of “preserved sardines” exclusively from fish of the species *sardina philchardus* was “a product characteristic “intrinsic to” preserved sardines.”³⁷⁸ Furthermore, the AB, recalling that it had explained a “means of identification” as a product characteristic in *EC-Asbestos*, noted that a “name” played an important role as a “means of identification”.³⁷⁹

In *US-Clove cigarette*, the Panel noted that the US measure laid down “product characteristics” in the negative form because it prohibited “cigarettes from containing certain constituents or additives with a ‘characterizing flavor’”.³⁸⁰ It affirmed that the flavor of cigarette was “not only a “feature”... but a feature that was “intrinsic to the product itself”.³⁸¹

In *US-COOL*, the Panel recalled that, in *EC-Asbestos*, the AB had found that labeling was a product characteristic and that, in *EC-Trademarks and GI(Australia)*, the Panel had found that “an explicit requirement to indicate country of origin on the label of the product [was] indeed a labeling requirement for the purpose of the definition of “technical regulation”. Accordingly, the Panel concluded that the country of origin labeling which was the essence of the COOL measure addressed product characteristic, fulfilling the second criterion.

In *US-Tuna II*, the Panel found that there was no disagreement between the disputing parties that the US measures was labeling requirements which were applied to a product, namely tuna products. Determining that the US measures was labeling requirements, the Panel concluded that the measure at issue was one of the subject-matter listed in the second sentence of Annex 1.1.³⁸² The Panel found it unnecessary to consider whether the measure

³⁷⁶ Panel report, *EC-Sardines*, para. 7.45. AB report, *EC-Sardines*, para. 179.

³⁷⁷ AB report, *EC-Sardines*, para. 177.

³⁷⁸ AB report, *EC-Sardines*, para. 190.

³⁷⁹ AB report, *EC-Sardines*, para. 191.

³⁸⁰ Panel report, *US-Clove cigarette*, para. 7.32.

³⁸¹ Panel report, *US-Clove cigarette*, para. 7.31.

³⁸² Panel report, *US-Tuna*, para. 7.78.

additionally falls within the scope of the first sentence.³⁸³

5.3.4 The criterion “mandatory compliance”

The third element to determine a “technical regulation” is related to the question whether compliance with the product characteristics laid down in the document is mandatory.³⁸⁴ In *EC-Asbestos*, the AB explained that a “technical regulation” must “regulate the “characteristics” of products in a binding or compulsory fashion” and that, with respect to products, it must have “the effect of prescribing or imposing one or more “characteristics””.³⁸⁵ In applying the criterion, the AB observed that “all products must be asbestos free; any products containing asbestos are prohibited” and that “compliance with the prohibition against products containing asbestos [was] mandatory and [was], indeed, enforceable through criminal sanctions”.³⁸⁶

In *EC-Sardines*, both Panel and the AB noted that a certain provision of the EC Regulation provided explicitly that it would “be binding in its entirety and directly applicable in all Member States”, which clearly indicated that the compliance with the EC measure was mandatory.³⁸⁷

In *US-Clove Cigarette*, the Panel also considered the language of the relevant US provisions which provided that a cigarette *should not* contain any artificial or natural flavor except for tobacco or menthol, the effect of the law that prohibited the manufacture and sale of cigarettes with certain characterizing flavours, and the enforcement mechanism which addressed and punished non-compliance.³⁸⁸

In *US-COOL*, the panel examined separately whether the COOL measure and the Vilsack letter were mandatory. With respect to the COOL measure, the Panel noted the languages “shall” and “mandatory COOL” in the relevant provisions, the requirement for “any person engaged in the business of supplying a covered commodity to a retailer’ to provide country of

³⁸³ Panel report, *US-Tuna*, para. 7.79.

³⁸⁴ AB report, *EC-Asbestos*, para. 68.

³⁸⁵ AB report, *EC-Asbestos*, para. 68.

³⁸⁶ AB report, *EC-Asbestos*, para. 72.

³⁸⁷ Panel report, *EC-Sardines*, paras. 7.29-7.30. AB report, *EC-Sardines*, para. 194 and footnote 111.

³⁸⁸ Panel report, *US-Clove cigarette*, para. 7.39.

origin information to retailer”, and enforcement mechanism which imposed a fine and a sanction in case of a violation.³⁸⁹ The Panel concluded that the compliance with the COOL measure was mandatory.

Although the disputants did not contest that compliance with the COOL measure was mandatory, they diverged in views regarding the so called *the Vilsack letter* in the dispute. Canada, one of the complainants, contested that “an instrument which [was] non-binding in the domestic legal system of a WTO Member may nevertheless be “mandatory” under the TBT Agreement” and particularly noted “an effective form of compliance with the Vilsack letter” by showing that there was a certain amount of the shift away from labels B and C towards an increased use of Label A.³⁹⁰ In line with Canada’s claim, Mexico argued that, in spite of the use of the word “voluntary” and regardless of the issuing authority, the Vilsack letter made “possible restrictive modification to the COOL measure” and contained a kind of “threats” taken seriously by US industry.³⁹¹

In its refute, the US submitted that the Vilsack letter was not mandatory since it did not contain binding obligations, it used the word “voluntary”, and it did not regulate the characteristics of products in a binding or compulsory fashion.³⁹²

The Panel stated that, “[o]n its face, the Vilsack letter is clearly not mandatory”.³⁹³ Then, it confirmed that the nature of compliance was “not a merely formalistic question” and agreed with the complainants that this matter should not be decided “purely on the basis of the language in the Vilsack letter, in particular the use of the word “voluntary”, which would allow Members to escape the coverage of large portions of the TBT Agreement.³⁹⁴ Warning against a formalistic approach, the Panel mentioned that the question therefore remained “whether compliance with the Vilsack letter [might] be considered de facto mandatory, namely, whether, in the words of the Appellate Body “with respect to products”, the Vilsack letter “ha[d] the *effect* of prescribing or imposing one or more ‘characteristics’ – ‘features’,

³⁸⁹ Panel report, *US-COOL*, paras. 7.156-7.162.

³⁹⁰ Panel report, *US-COOL*, paras. 7.164-5.

³⁹¹ Panel report, *US-COOL*, para. 7.166.

³⁹² Panel report, *US-COOL*, paras. 7.168-7.171.

³⁹³ Panel report, *US-COOL*, para. 7.174.

³⁹⁴ Panel report, *US-COOL*, para. 7.175.

‘qualities’, ‘attributes’, or other ‘distinguishing mark’”.³⁹⁵ After examining testimonies and evidence submitted by the complaints, the Panel concluded that mandatory compliance with the Vilsack letter was insufficiently demonstrated and it was also insufficiently proved that the Vilsack letter would “regulate the ‘characteristics’ of products in a *binding* or *compulsory* fashion, let alone had “the effect of prescribing or imposing one or more ‘characteristics’ – ‘features’, ‘qualities’, ‘attributes’, other ‘distinguishing mark’” for the products at issue.³⁹⁶

The concept of mandatory compliance was rigorously dealt in *US-Tuna II*, analysis of which is found in the following Section 5.4.

5.4 Determination of “Mandatory Compliance” in *US-Tuna II*

The distinction between technical regulations and standards is critical for the operation of the WTO TBT Agreement. It is so because the distinction will subsequently determine an applicable set of rules and have different legal consequences. To be specific, determination of a certain measure as a ‘technical regulation’ would result in unconditionally applying Article 2 or 3 of the TBT Agreement without exceptions while determination of a certain technical specification as a ‘standard’ would bring about a conditional application of the disciplines laid out in the Code of Good Practice in Annex 4 of the Agreement. The expression “conditional” is used because only those standards bodies which have previously accepted the Code would be subject to the application except for national standards bodies.

There have been few dispute cases in which the issue of distinction between ‘technical regulation’ and ‘standard’ has been one of the central dispute issues. A majority of the measures challenged under the TBT Agreement was not disputed hard in this legal characterization issue, and they relatively easily found to be ‘technical regulation’.

However, this does not mean that the issue of legal characterization and distinction between ‘technical regulation’ and ‘standard’ is less important than other legal issues mainly discussed so far. Recently, the crucial concept of “mandatory” compliance and its

³⁹⁵ Panel report, *US-COOL*, para. 7.176.

³⁹⁶ Panel report, *US-COOL*, para. 7.192.

subsequent implication for distinguishing ‘technical regulations’ and ‘standards’ under the TBT regime went through a daunting challenge in the *US-Tuna II* case and the conclusions of the DSB drew a huge attention. For the first time, the dispute settlement of the *US-Tuna II* case unveils significantly divided views among the WTO Members and fundamentally diverging legal interpretations even between the experts in panel with respect to interpretation of the TBT Agreement. In addition, the case suggested various ideas and approaches taken by the third party participants in clarifying the concept of “mandatory” compliance. All the opinions and conclusions found in the case show that the dividing line between ‘standard’ and ‘technical regulation’ is blurred and legal criteria applied for the distinction are ambiguous and lacks any consensus among the Members and relevant experts. In this section, this legal issue show in *US-Tuna II* is thoroughly examined, and different views and arguments are analyzed.

5.4.1 Arguments of the disputants

5.4.1.1 Mexico’s interpretation of “mandatory” compliance

Mexico claimed that the US measure in dispute was a “technical regulation” within the meaning of the TBT Agreement. It explained that the US statutory and regulatory provisions that established the dolphin-safe labelling scheme constituted the “document” and the “document” met the three criteria in the definition of “technical regulation” in Annex 1.1.³⁹⁷

First, it alleged that the US labelling scheme was applied to “tuna product” as defined by the US Section 1385I(5), which was ‘an identifiable product or group of products.’³⁹⁸ Second, it considered that the US measures regulated the conditions under which a tuna product could be labeled as “dolphin-safe” and this requirement was a ‘product characteristic’.³⁹⁹

Last, Mexico argued that the compliance of the US measure was mandatory. It noted that the US measure prohibited mentioning of the term “dolphin-safe” or any analogous term of

³⁹⁷ Panel report, *US-Tuna II*, para. 4.54.

³⁹⁸ Panel report, *US-Tuna II*, para. 4.54.

³⁹⁹ Panel report, *US-Tuna II*, para. 4.54.

symbol on the label of any tuna product offered for sale in the US market if the product contained tuna harvested in a method inconsistent with the requirement of the US labelling scheme.⁴⁰⁰ It emphasized that it was also prevented from using a “dolphin-safe” label even when a relevant international standard was met.⁴⁰¹ Based on the reasoning, Mexico claimed that the US measure was a mandatory technical regulation.

Moreover, Mexico went further to argue that “even if the US labelling scheme [were] not to be considered *a priori* mandatory, it [was] *de facto* mandatory because the market conditions in the US [were] such that it [was] impossible to effectively market and sell tuna products without a dolphin-safe designation.”⁴⁰²

Mexico tried to show altered conditions of competition by the US measure and its adverse impact on Mexican tuna products. In its first written submission, it said, “[f]undamentally, the US [was] trying to force “choices” on the Mexican industry through its labelling measure. That should not be permissible under the TBT Agreement”.⁴⁰³ In its second written submission, it noted the effect of the US measure, stating, “[t]he US measures [had] the effect of excluding Mexican tuna products from the major distribution channels”.⁴⁰⁴ Moreover, it provided some statistical evidence for relative shrinking share of the US shrimp imports from Mexico compared to those of other countries.⁴⁰⁵ These adverse impacts were used by Mexico to support that the US measure had *de facto* mandatory nature.

Mexico described the labelling scheme as imposing requirements “in negative form”. It explained that it was not possible to label tuna products in more than one standard and, therefore, dolphin-safe tuna products offered for sale in the US must not possess certain characteristics except for the designated one. As a consequence, Mexico continued to argue that the US measure was mandatory not because a label was *de jure* required for market sales but because of the “fact that the US measures [restricted] retailers, consumers and producers to a single choice for labeling tuna products as dolphin-safe.”⁴⁰⁶

In making its case, Mexico tried to identify the disputed circumstances with those in *EC-*

⁴⁰⁰ Panel report, *US-Tuna II*, para. 4.54.

⁴⁰¹ Panel report, *US-Tuna II*, para. 4.54.

⁴⁰² Panel report, *US-Tuna II*, para. 4.54.

⁴⁰³ Panel report, *US-Tuna II*, para. 4.193.

⁴⁰⁴ Panel report, *US-Tuna II*, para. 4.222.

⁴⁰⁵ Panel report, *US-Tuna II*, paras. 4.223-5.

⁴⁰⁶ Panel report, *US-Tuna II*, paras. 4.271-2.

Sardines case. It viewed that the US measure basically covered two different types of tuna based on the fishing method and allowed only the product which contained tuna caught in accordance with the US scheme just like the EC measure, in *EC-Sardines*, provided that only products prepared from a certain species, i.e. *Sardina pilchardus*, could be marked with the indication of “preserved sardines”.⁴⁰⁷ In both cases, Mexico explained, the products at issue, i.e. tuna and sardines products, respectively, could be sold or marketed without the designation of “dolphin-safe” and “sardines” although market opportunities were limited.⁴⁰⁸

Mexico refuted the US argument, particularly charging that the US was taking a narrow approach toward the concept of “mandatory compliance”. In Mexico’s view, the US considered that, in order to be technical regulation, a measure must require a product to be labeled in a certain way in order to be marketed or sold. Mexico agreed that this was one example of a technical regulation but not the only example.

5.4.1.2 US’ interpretation of “mandatory” compliance

The US argued that its measure was not a technical regulation within the meaning of Annex 1.1 to the TBT Agreement. It claimed that its provisions did not specify the product characteristics that tuna product must meet in order to be sold on the US market.⁴⁰⁹ Also, it argued that its provisions were not mandatory because they constituted a voluntary labelling measures.⁴¹⁰ It noted that it was perfectly legal to sell tuna products in the US market that were not dolphin-safe and that did not bear the dolphin-safe label.⁴¹¹ It repeatedly emphasized that the labelling was not required in order that the tuna product could be sold and that marketers were free to choose whether to participate in the US labelling scheme and regardless of their choice could continue to sell their products.⁴¹²

The US refuted the Mexico’s claim that the US measure was a technical regulation. With respect to Mexico’s argument that a criteria for determining the “mandatoriness” was related

⁴⁰⁷ Panel report, *US-Tuna II*, para. 4.273.

⁴⁰⁸ Panel report, *US-Tuna II*, para. 4.343.

⁴⁰⁹ Panel report, *US-Tuna II*, para. 4.83.

⁴¹⁰ Panel report, *US-Tuna II*, para. 4.84.

⁴¹¹ Panel report, *US-Tuna II*, para. 4.84.

⁴¹² Panel report, *US-Tuna II*, para. 4.175.

to whether the label was the only label that may be used in the market, the US stated that there was no legal basis in the TBT Agreement.⁴¹³ In addition, the US charged that Mexico's interpretation was incorrect because Mexico conflated the meaning of the term "labelling requirement" with the phrase "with which compliance is mandatory".⁴¹⁴

Moreover, the US rejected Mexico's alternative argument that the US measure was *de facto* mandatory because a labelling requirement could not be *de facto* mandatory simply based on private actors' preference of products labeled in a certain way. The US further asserted that some form of government action must make it compulsory or obligatory in order to render measure mandatory; however, in its view, Mexico identified no government action that made compliance with the US dolphin-safe labelling provisions mandatory.⁴¹⁵ The US perceived that Mexico had equated the US measures as "pressure" amounted to a *requirement* and that US measure had created consumers' preference for dolphin-safe tuna products, which it argued to be having no legal basis and ignoring the history leading up to the enactment of the US provisions.⁴¹⁶

5.4.2 The Panel's decision

In Panel' view, compliance is "mandatory" if the document has "the effect of regulating in a legally binding or compulsory fashion the characteristics at issue, and if it thus *prescribes* or *imposes* in a *binding* or *compulsory* fashion that certain product *must* or *must not* possess certain characteristics, terminology, symbols, packaging, marking or labels or that it *must* or *must not* be produced by using certain processes and production methods. By contrast, compliance with the characteristics or other features laid out in the document would not be "mandatory" if compliance with them was discretionary or "voluntary".⁴¹⁷ Then, Panel considered the two aspects of "mandatory" as submitted by Mexico, i.e., *de jure* mandatory and *de facto* mandatory compliance. Panel viewed that compliance would be *de jure* "mandatory" if "the mandatory character of the provisions would be discernible from an

⁴¹³ Panel report, *US-Tuna II*, para. 4.309.

⁴¹⁴ Panel report, *US-Tuna II*, para. 4.307.

⁴¹⁵ Panel report, *US-Tuna II*, para. 4.311.

⁴¹⁶ Panel report, *US-Tuna II*, para. 4.362.

⁴¹⁷ Panel report, *US-Tuna II*, para. 7.111.

examination of the terms or structure the measures themselves”.⁴¹⁸

The Panel’s such view on the *de jure* and *de facto* concept was based on its reference to the previous ruling by the AB in other disputes. It took note of the AB’s decisions in defining export subsidies ‘in law or in fact’ in Canada-Aircraft and Canada-Autos. Although the AB’s rulings which the Panel had cited were related to legal issues of the Subsidy Agreement, the Panel found them relevant since they essentially determined “the inherent differences between a *de jure* and a *de facto* analysis”.⁴¹⁹ Accordingly, it cited the following passages from Canada-Aircraft:

“Article 3.1(a) prohibits *any* subsidy that is contingent upon export performance, whether that subsidy is contingent ‘in law or in fact’. The Uruguay Round negotiators have, through the prohibition against export subsidies that are contingent *in fact* upon export performance, sought to prevent circumvention of the prohibition against subsidies contingent *in law* upon export performance. In our view, the legal standard expressed by the ‘contingent’ is the same for both *de jure* or *de facto* contingent. De jure export contingency is demonstrated on the basis of the words of the relevant legislation, regulation or other legal instrument.” (italics in the original, underlined added by Panel in *US-Tuna II*)⁴²⁰

In line with the above citation, the Panel found another similar reference from the AB’s consideration regarding export subsidies ‘in law or in fact’ in Canada-Autos. It reads as follows:

“We start with what have held previously. In our view, a subsidy is contingent ‘in law’ upon export performance when the existence of that condition can be demonstrated on the basis of the very words of relevant legislation, regulation or other legal instrument constituting the measure. The simplest, and hence, perhaps, the uncommon, case is one in which the condition of exportation is set out

⁴¹⁸ Panel report, *US-Tuna II*, para. 7.114.

⁴¹⁹ Panel report, *US-Tuna II*, Footnote 303.

⁴²⁰ Panel report, *US-Tuna II*. Originally in AB Report, Canada-Aircraft, para. 167.

expressly, in so many words, on the face of the law, regulation or other legal instrument. We believe, however, that a subsidy is also properly held to be *de jure* export contingent where the condition to export is clearly, though implicitly, in the instrument comprising the measure. Thus, for a subsidy to be *de jure* export contingent, the underlying legal instrument does not always have to provide *expressis verbis* that the subsidy is available only upon fulfillment of the condition of export performance. Such conditionality can also be derived by necessary implication from the words actually used in the measure.”⁴²¹

In line with the implication of the precedent rulings, the Panel decided to determine whether the US measure at issue in the *US-Tuna II* dispute *de jure* establishes labelling requirements for tuna products by examining “the terms of the US dolphin-safe provisions themselves”.⁴²²

Before beginning its analysis, the Panel tried to make a clear distinction between a labelling “requirement” and “mandatory” compliance with a requirement. It explained that a labelling “requirement” referred to the conditions or criteria to be fulfilled in order to comply with a document while the notion of “mandatory” compliance with a requirement meant a condition which had been made compulsory by law. Then, the Panel suggested that the questions in the relevant dispute involved both: (i) the question whether the document laid down certain conditions for the use of a label, or prescribes a certain content for a given label, and (ii) the question whether the document at issue regulated in a binding fashion these conditions or content.⁴²³

Then, the Panel proceeded to examine the US measures at dispute. It noted that the provisions of the US labelling system “regulated” the use of the term “dolphin-safe” as well as the use of other related terms on labels for tuna products offered for sale on the US market. They regulated dolphin-safe labelling requirements “in a binding or compulsory fashion” because they prescribed, in a binding and legally enforceable instrument, the manner in which a dolphin-safe label could be obtained in the US, and disallowed any other use of a dolphin-

⁴²¹ Panel report, *US-Tuna II*. Originally in AB Report, Canada-Autos, para. 100.

⁴²² Panel report, *US-Tuna II*, para. 7.114.

⁴²³ Panel report, *US-Tuna II*, para. 7.117.

safe designation. Also, the manner they prescribed and imposed the conditions under which a product might be labeled dolphin-safe was “in a negative form” in that no tuna product may be labeled dolphin-safe or otherwise refer to dolphins, porpoises or marine mammals if it did not meet the conditions set out in the measure and thus imposed a prohibition on the offering for sale in the US of tuna products bearing a label and not meeting the requirement.⁴²⁴

The Panel considered that the situation at dispute was very similar to those in *EC-Sardines* and *EC-Trademarks and GI(Australia)*. The Panel explained the situation of the dispute at hand as that, in order to be marketed as dolphin-safe tuna, tuna product must have been prepared exclusively from fish caught in the specific conditions under the US provisions; otherwise, tuna products not complying with the specific conditions in the US regulation “were prohibited from being identified and marketed under an appellation including the term “dolphin-safe” or other related designations”.⁴²⁵ Noting the similarities in *EC-Sardines*, the Panel restated the relevant passages made by the AB that preserved products made of the species not specified in the relevant EC Regulation “were prohibited from being identified and marketed under an appellation including the term ‘sardines’” and that to be marketed as “preserved sardines”, product must be prepared exclusively from fish of the species designated by the EC Regulation. In this way, the Panel considered the AB’s conclusion in that case that the compliance with the EC Regulation was “mandatory” and, overall, a “technical regulation”.⁴²⁶

The Panel also equated the situation at dispute with those in *EC-Trademarks and GI(Australia)* in that, in the latter case, the indications of PDO, PGI or equivalent national indications were regulated in a negative form. In other words, in this case, products with a geographical indication identical to a Community protective name that do not satisfy the labelling requirement were prohibited from using other indications.⁴²⁷

The Panel thus concluded from the precedent decisions by the AB that “the mere fact that it [was] legally permissible to place the product on the market without using the designation that [was] regulated by the measures at issue [did] not compel the conclusion that these

⁴²⁴ Panel report, *US-Tuna II*, para. 7.131.

⁴²⁵ Panel report, *US-Tuna II*, para. 7.133.

⁴²⁶ Panel report, *US-Tuna II*, para. 7.135.

⁴²⁷ Panel report, *US-Tuna II*, para. 7.136.

measures [were] not “mandatory” within the meaning of Annex 1.1”. Then, the Panel went further to find that “[s]imilarly, in the present case, the legal consequence of the measures for tuna products not meeting the requirements of the regulation [was] that they [may have been] labeled dolphin-safe. This implies that such products [were] prohibited from being identified and marketed under this appellation.”⁴²⁸

Finally, the Panel summarized several aspects of the US measure, which together led to its final conclusion that the US measure at issue was mandatory and, thus, a technical regulation. First, it considered important the component of legal enforceability and binding character. Particularly, it noted that the measures were issued by the government and included legal sanctions. Second, it noted that the measure prescribed certain requirements, regulated the use of a certain term and, at the same time, prohibited the use of other terms in cases where specific conditions were not met. In the Panel’s view, the measures left no discretion to resort to any other standards to inform consumers about the dolphin-safe character, thereby effectively regulating the “dolphin-safe” status in a binding and exclusive manner. Based on the findings, the Panel concluded that the measures at issue established labelling requirements, compliance with which was mandatory.

In this way, the Panel examined the US measure only based on the concept of *de jure* “mandatory” compliance and finally concluded with the determination that the US measure was mandatory and a technical regulation. Although it had noted the argument by Mexico to interpret the “mandatory” concept to incorporate both *de jure* and *de facto* mandatoriness, the Panel based its analysis exclusively on the *de jure* “mandatory” concept

In its examination, the Panel conceptually distinguished the situation of the dispute from another situation in which various standards may coexist in relation with the same issue, with different but related claims. Thus, the Panel found that the US label was *de jure* mandatory to comply since it prescribed only and exclusive means of indicating a certain character on the products.

⁴²⁸ Panel report, *US-Tuna II*, para. 7.137.

5.4.3 A dissenting opinion of the Panel

The Panel's final determination that the measure at issue was mandatory to comply and, therefore, constituted a technical regulation was not based on a consensus by all members of the Panel. One panel interpreted the concept of "mandatory" compliance differently from the majority's opinion.

The dissenting panel interpreted the concept of "mandatory" compliance as incorporating both *de jure* and *de facto* "mandatory" compliance and further suggested how to examine each of them with what legal components. According to the *de jure* "mandatory" concept the dissenting panel had defined and explained, the US measure would be considered not "mandatory" or, instead, "voluntary". According to the *de facto* "mandatory" concept suggested by the panel, Mexico had failed to establish the case successfully because it did not deal with one of the components constituting the *de facto* concept, namely, the fact that a limited market access was the result of some form of government actions. As a result, the dissenting panel held the view that the compliance with the US measure in itself was not definitely *de jure* mandatory. At the same time, however, it concluded that the measure was not *de facto* mandatory, either, only because the complainant had not sufficiently substantiated its argument.

Before proceeding to examine the "mandatory" character of the measure, the dissenting panel tried to make a distinction between labelling requirement and compulsory labelling scheme. The panel emphasized the ordinary meaning of the term "labelling requirement" and stated that labelling requirements were "requirements that must be fulfilled in order to be allowed to use a certain label. Any labeling scheme foresees such requirements – in fact, if such requirement would not exist and if a certain label could be used independent of whether specific requirements [were] fulfilled, the label would become meaningless."⁴²⁹ Therefore, the panel stated that the criteria under labelling scheme must be required or made obligatory and such a mandatory character in implementing labelling scheme generally kept labelling schemes not falling useless.

On the other hand, in the view of the dissenting panel, labelling schemes were compulsory

⁴²⁹ Panel report, *US-Tuna II*, para. 7.150.

when the use of a certain label was compulsory to access the market, or they were voluntary when products could be marketed with or without the label.⁴³⁰ However, “labelling requirements” must be fulfilled even within a voluntary labelling scheme. In other words, under the circumstances where producers might freely decide whether to use a certain label or not, if a producer chose to use a label, then he/she must fulfill the criteria set out under the labelling scheme.

The panel suggested that his/her interpretation would be confirmed by the definitions in Annex 1.1 and Annex 1.2. The panel noted that both paragraphs referred to labelling requirements, indicating that labelling requirements could be either technical regulations or standards and the criteria for distinguishing technical regulations and standards were related to the fact whether compliance was mandatory or not. Then, according the panel, to give any meaning and make provisions effective, “the requirement that compliance [was] mandatory [could not] relate to the obligation to meet certain requirements to be allowed to use the label”.⁴³¹ Instead, the panel explained, the question whether a labelling scheme was compulsory or voluntary was related to the question whether products must use a label to be marketed or products was allowed to be marketed with or without the label.

According to the panel’s interpretation of mandatory compliance of a measures, the US dolphin-safe labeling scheme was not *de jure* mandatory measure. The reason was that neither the use of the “dolphin-safe” label nor the use of the specific fishing techniques and locations that conditioned access to the label was compulsory in a sense that tuna products could be marketed with or without them. In addition, the US prohibited use of alternative labels and the use of a label in violation of the labelling requirement was subject to enforcement measure, which the panel considered as “a typical situation common to both voluntary and mandatory labelling schemes” in order to prevent any misleading or false declarations.⁴³² This legally binding character or legal enforceability of the measures alone was not sufficient to modify the essentially voluntary nature of the US labeling scheme to mandatory one.⁴³³ The panel continued to explain, “[r]ather, the notion of ‘mandatory

⁴³⁰ Panel report, *US-Tuna II*, para. 7.150.

⁴³¹ Panel report, *US-Tuna II*, para. 7.151.

⁴³² Panel report, *US-Tuna II*, para. 7.152.

⁴³³ Panel report, *US-Tuna II*, paras. 7.153-7.158.

compliance' [was] related more fundamentally to the fact that the measure at issue [prescribed] or [imposed] compliance with specific requirements to allow a product to be marketed, without allowing discretion to depart from them".⁴³⁴

Then, the panel addressed Mexico's claim that "technical regulations" could encompass not only *de jure* mandatory compliance but also *de facto* mandatory compliance.⁴³⁵ Accordingly, the panel examined whether the ordinary meaning of the language in the definitions of the TBT Agreements allowed or excluded the possibility of *de facto* mandatory technical regulation, which the panel turned down. Specifically, the panel elaborated, "[w]hat [was] required [was] that compliance with the characteristics laid down in the document be mandatory ... This [did] not exclude that voluntary and non-mandatory labelling requirements [might] become mandatory as a result of 'some other government action' or more generally, some other action attributable to the Member concerned".⁴³⁶ Also, the panel noted that many other WTO provisions had been applied with both *de jure* and *de facto* coverage and, in order for the compliance of a measure to be *de facto* mandatory, two factors should be examined: "the text of the provision in question" and "the potential consequences of excluding the possibility of applying that norm" of the *de facto* concept.⁴³⁷

Thus, the panel suggested a two-tier test to determine a *de facto* mandatory compliance: (i) the impossibility of marketing a product without fulfilling a requirement, or affixing the "dolphin-safe" label in the dispute; and (ii) such impossibility must arise from facts sufficiently connected to the measures or to another government action, - the US dolphin-safe provisions in the case.⁴³⁸ Then, the panel analyzed the situation at dispute and concluded that non-labelled products were sold in the US market and Mexico was claiming impossibility of "effective" marking rather than impossibility of marketing at all, which did not provide sufficient basis for altering the voluntary or "not mandatory" nature of that standards, within determination that compliance was mandatory. The panel explained that fulfillment of this

⁴³⁴ Panel report, *US-Tuna II*, para. 7.156.

⁴³⁵ Panel report, *US-Tuna II*, para. 7.172. As evidence, the panel interpreted that the ordinary meaning of the language used in the definition of technical regulation in the TBT Agreement seemed not to exclude the possibility that compliance had to be *de facto* mandatory.

⁴³⁶ Panel report, *US-Tuna II*, para. 7.173.

⁴³⁷ Panel report, *US-Tuna II*, para. 7.171.

⁴³⁸ Panel report, *US-Tuna II*, para. 7.175.

first factor would not substantiate the determination of a *de facto* “mandatory” compliance.⁴³⁹ Second, it further examined whether the limited market access by non-labelled products was the result of the application of the US measure at issue or of some government action by the US. With respect to this second issue, the panel also concluded that Mexico had failed to demonstrate the effect of the measure or some government action on the limited market access.⁴⁴⁰

In conclusion, the panel in a separate opinion suggested that the compliance of US measure at dispute was not *de jure* mandatory since it sets out no obligation to label (or not to label) tuna as “dolphin-safe”. Also, the panel found that it was not *de facto* mandatory for tuna products to comply with the US labeling scheme because Mexico had failed to successfully demonstrate that it was impossible to market tuna products in the US without the label and that such impossibility was resulted from the US provisions or another government action.

5.4.4 The Appellate Body’s decision

The US did not accept the way the Panel had reviewed the measure at dispute to determine that it was a ‘technical regulation’ within the meaning of the TBT Agreement. On appeal, the US mainly alleged that the Panel incorrectly applied the phrase “with which compliance is mandatory”.

However, the AB basically agreed with the panel’s final determination that compliance with the US dolphin-safe labelling scheme was mandatory and, therefore, the measure was a technical regulation within the meaning of the TBT Agreement.

The AB took a textual approach to interpret definitions of technical regulations and standards in Annex 1.1 and Annex 1.2. Then, it highlighted that both definitions contained the identical sentence of “may include or deal exclusively deal with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method”, and that terminology, symbols, packaging, marking and labelling requirements may be subject-matter of either technical regulations or standards. Thus, these

⁴³⁹ Panel report, *US-Tuna II*, para. 7.176.

⁴⁴⁰ Panel report, *US-Tuna II*, paras. 7.179-7.186.

common features of both technical regulations and standards could not, by themselves, determine legal characterization of a measure under the TBT Agreement. For example, both technical regulations or standards could contain labelling requirements, i.e., conditions that must be met in order to use a label and those conditions could be “compulsory” or “binding” and “enforceable”, which cannot, therefore, “be dispositive of the proper characterization of the measure under the TBT Agreement”.⁴⁴¹

The AB considered that there were additional features that determined technical regulations or standards. It suggested that those relevant features of a measure might include “whether the measure [consisted] of a law or a regulation enacted by a WTO Member, whether it [prescribed or prohibited] particular conduct, whether it set[]out specific requirements that [constituted] the sole means of addressing a particular matter and the nature of the matter addressed by the measure”.⁴⁴²

Applying the criteria, the AB examined whether the US measure at issue constituted a technical regulation. In assessment, the AB noted that the measure at issue consisted of a law enacted by the US Congress and regulations set out in the US Code of Federal Regulations.⁴⁴³ Also, the labelling scheme not only set out conditions for eligibility for the label but also prohibited any reference to dolphin, porpoise, or marine mammals on the label.⁴⁴⁴ Consequently, the US measure established “a single and legally mandated set of requirement for making any statement with respect to the broad subject of “dolphin-safety” of tuna products”.⁴⁴⁵ Last, the AB considered important the fact that the US measure “thus [covered] the entire field of what “dolphin-safe” [meant] in relation to tuna products in the US”.⁴⁴⁶ It repeatedly noted this last feature of the measure, stating that “while it [was] possible to sell tuna products without a “dolphin-safe” label in the US, any “producer, importer, exporter, distributor or seller” of tuna products must comply with the measure at issue in order to make any “dolphin-safe” claim”.⁴⁴⁷

Furthermore, the AB rejected the US claim that the measure [was] mandatory only if there

⁴⁴¹ Appellate Body report, *US-Tuna II*, para. 188.

⁴⁴² Appellate Body report, *US-Tuna II*, para. 188.

⁴⁴³ Appellate Body report, *US-Tuna II*, para. 192.

⁴⁴⁴ Appellate Body report, *US-Tuna II*, para. 193.

⁴⁴⁵ Appellate Body report, *US-Tuna II*, para. 193.

⁴⁴⁶ Appellate Body report, *US-Tuna II*, para. 193.

⁴⁴⁷ Appellate Body report, *US-Tuna II*, para. 196.

[was] a requirement to use the label in order to place the product for sale on the market.⁴⁴⁸ The reasons for the AB's ruling were primarily based on the legal text of the Annex 1.1 to the TBT Agreement. It particularly noted that the text did not use the words "market" or "territory" nor described "mandatory" labelling requirement only as a requirement to use a particular label to market a product.

Moreover, the AB found that its rejection to the US claim was also confirmed by the situation and its rulings in *EC-Sardines*. In that case, the AB noted that, it was possible to sell in the EC market products made of other species than "sardines" designated by the EC Regulation, as long as they were not marketed under the appellation "preserved sardines". In the AB's view, it was legally permissible to sell a product on the market without using a particular label or indication and such a fact was not determinative when examining whether a measure was a "technical regulation".⁴⁴⁹ Thus, when non-labelled products were allowed to be marketed, that fact alone could determine that the label was not mandatory or voluntary, rendering the measure a standard. It seems that the AB had strongly rejected the market-access based approach for determining "mandatory" character of the compliance with a disputed measure.

5.4.5 Summary of approaches to apply the element of "mandatory" compliance

The examination of different approaches to interpret "mandatory" compliance so far is summarized in <Table 17>. The disputants tried to make arguments based on the concept *de jure* and *de facto* "mandatory" compliance and the Panel also reviewed based on this approach. Mexico claimed that the compliance was *de jure* and *de facto* mandatory while the US refuted that the compliance was not mandatory because it was not *de facto* mandatory. The majority Panel ruled that the compliance was *de jure* mandatory and, therefore, the US labelling measure at issue was a mandatory 'technical regulation'. In contrast, the dissenting member of the Panel considered that the compliance was not *de jure* mandatory but it was not

⁴⁴⁸ Appellate Body report, *US-Tuna II*, para. 196.

⁴⁴⁹ Appellate Body report, *US-Tuna II*, para. 198.

sure whether it was *de facto* mandatory either due to lack of relevant evidence. The AB, however, did not apply this *de jure* or *de facto* mandatory approach but, instead, came up with the four criteria.

Table 17. Summary of the disputants' claims and the Panel/Appellate Body's rulings

	Technical Regulations	Standards
Mexico	<ul style="list-style-type: none"> - <u>Compliance is de jure mandatory.</u> - <u>Compliance is de facto mandatory</u> because it is impossible to effectively market without the label; it alters competition condition and causes adverse impact. - prohibits other means; provides sole means. 	--
US	--	<ul style="list-style-type: none"> - <u>Compliance is not mandatory</u> because non-labelled products may be marketed. - <u>Compliance is not de facto mandatory</u> simply based on private actors' preference; some form of government action must make it compulsory or obligatory.
Panel	<ul style="list-style-type: none"> - <u>Compliance is de jure mandatory</u> because mandatory character is discernible from the terms or structure of the measures themselves. - legally enforceable and binding - regulating in a legally binding or compulsory fashion; prescribing or imposing in a binding or compulsory fashion that products must or must not possess certain characteristics; prohibiting sale of labelled products not meeting the requirement. - providing exclusive means, leaving no discretion to resort to any other standards. 	--
Separate panel opinion	--	<ul style="list-style-type: none"> - <u>Compliance is not de jure mandatory</u> because non-labelled products may be marketed. - <u>It was not successfully established to determine de facto mandatory compliance;</u> two components to demonstrate: 1) impossibility to market without the label 2) such impossibility arise from the measure or another government action

The Appellate Body	<p>Examination under four criteria:</p> <p>1) whether it was enacted by law;</p> <p>2) whether it prescribes, prohibits, regulates certain product characteristics;</p> <p>3) whether it provides only and exclusive means to express certain product characteristics;</p> <p>4) examination of the nature of the matter addressed by the measure.</p> <p>- no expressive application of de jure or de facto concept</p> <p>- expressive objection to depend only on the market-access criterion</p>	--
--------------------	--	----

5.5 Divergent Approaches to Interpret the Concept of “Mandatory Compliance”

In *US-Tuna II*, disputants and third parties have suggested many different ways to interpret and apply the concept of “mandatory” compliance with a view to establish a dividing line between technical regulations and standards and to make the legal scope of standard meaningful and appropriate. For example, Mexico tried to find the binding character of the measure not only in the provisions of the relevant US law and regulations but also in the US market place, i.e., preference of consumers, distributors, and importers. In contrast, US argued that the non-binding character of the measure was evinced by the fact that the label was not a market-entry condition and non-labelled tuna products were legally allowed in the market.

One of the most noteworthy approaches is related to the notion of “de facto” and “de jure” mandatory compliance, based on which both disputing parties have made their arguments and the majority as well as a dissenting panels have examined the measure at issue. However, the AB did not expressly or directly address this newly suggested approach and, instead, came up with some detail criteria to examine when determining mandatory/voluntary compliance.

In this dispute, the Panel and the AB particularly took note of the ways or means in which

the US measure was implemented and enforced. The US labelling scheme did not allow any other analogous indication on the label and thus provided “only and exclusive” means to express the dolphin-safe characteristic of tuna products. This ‘exclusivity’ element seems to have been a decisive criteria for the Panel and the AB in making the conclusion that the US measure was a technical regulation.

Accordingly, this section studies and analyzes what each of the criteria is meant to be based on the explanation of the disputing parties, the Panel and the AB as well as some views suggested by the third parties of the dispute. Irrespective of their legal effect, those ideas may serve valuable foundations for developing the concept of “mandatory” compliance and thereby establishing a legal boundary between technical regulations and standards.

5.5.1 An approach based on “market sales condition” criterion

Arguing against the Mexico’s assertion that the US labelling scheme was a technical regulation, the US claimed that the US provisions at issue constituted a voluntary labelling measure because it was “perfectly legal to sell tuna products in the US that are not dolphin-safe and that do not bear the dolphin-safe label”.⁴⁵⁰ The US noted that “[m]arketers of tuna products [were] free to choose whether to participate in the US labelling scheme and regardless of that choice [continued] to sell their products in the US. Compliance with the US dolphin-safe labelling provisions [was], thus, not mandatory within the meaning of Annex 1 of the TBT Agreement.”⁴⁵¹

It can be inferred from this statements that the US interprets the term “mandatory” compliance primarily based the role of standards as a market sales condition. The US asked whether the measure required a product certain conditions or characteristics to conform before it is sold in market. Accordingly, if a product can be marketed without a label or without fulfilling any other product characteristics provided in a specific document, then such an technical specification will be considered “voluntary” standard. On the other hand, if sale of a certain product is prohibited in market unless it affixes the label or fulfills certain

⁴⁵⁰ Panel report, *US-Tuna II*, para. 4.84.

⁴⁵¹ Panel report, *US-Tuna II*, para. 4.175.

characteristics required by an authority, then such a market sale condition will amount to a ‘technical regulation’, the compliance with which is “mandatory”.

In response, Mexico generally disagreed with the US and challenged this approach for being “too narrow”. Mexico stated that the “market sale condition” approach may suggest one example of the analysis but not the only one.⁴⁵²

However, the idea of applying the “market sale condition” seems to have been strongly supported by the panel’s separate opinion. The dissenting panel basically considered this factor as a main criterion for determining “mandatory” character of the measure and examined whether the labelling scheme provided a “market sales condition” or not. The panel examined it in two ways: provisions themselves, i.e. *de jure* mandatory character, and actual effect of the measure on the product’s market access, i.e. *de facto* mandatory character.

In examining the *de jure* mandatory character, the panel reviews the measure in order to determine whether it imposes a general requirement to label or not to label tuna products as “dolphin-safe”. It describes voluntary character of the measure, contrasting it with the binding character of conditions set out within the labelling scheme. It states, “[i]t remains a voluntary and discretionary decision of operators on the market to fulfil or not fulfil the conditions that give access to the label, and whether to make any claim in relation to the dolphin-safe status of the tuna contained in the product. If an operator wishes to make such claim, however, it must abide with the conditions laid down in the DPCIA and other related measures.”⁴⁵³ Thus, the panel concludes that the US dolphin-safe labelling provisions do not establish *de jure* mandatory labelling requirements.⁴⁵⁴

Then, it proceeds to examine the measure based on the concept of *de facto* mandatory compliance. In other words, the panel considered whether, despite the absence of a *de jure* requirement, tuna products are nonetheless “compelled” to carry that label as a result of some other action attributable to the US.⁴⁵⁵ It suggests the meaning of “*de facto* mandatory” to be as the following: that the US labelling scheme “may be considered *de facto* mandatory in order to market tuna products in the US, if doing otherwise becomes impossible, not because

⁴⁵² Panel report, *US-Tuna II*, para. 4.343.

⁴⁵³ Panel report, *US-Tuna II*, para. 7.153.

⁴⁵⁴ Panel report, *US-Tuna II*, para. 7.165.

⁴⁵⁵ Panel report, *US-Tuna II*, para. 7.174.

it would contradict a mandatory provision in the measures, but because it would be prevented by a factual situation that is sufficiently connected to the actions of the US.” Then, it elaborates that, in his view, the *de facto* mandatory concept is comprised of two factors: impossibility of marking without the label and such impossibility is sufficiently caused by the US provisions at dispute or other government actions.

However, the AB clearly declined the approach. It first noted the US contention that compliance with a labelling requirement is “mandatory” only “if there is also a requirement to use the label in order to place the product for sale on the market” and that the compliance with the US measures is not mandatory because producers have the option of not using the label but nevertheless are able to sell the product on the market. Then, the AB emphasizes that there is no textual basis for interpreting the “mandatory” concept in such a way. Particularly, it highlights the fact that the text of the Annex 1.1 of the TBT Agreement does not use the words “market” or “territory” and does not indicate that a labelling requirement is mandatory only if there is a requirement to use a particular label in order to place a product for sale on the market.⁴⁵⁶ Thus, the AB states,

“[t]o us, the mere fact that there is no requirement to use a particular label in order to place a product for sale on the market does not preclude a finding that a measure constitutes a “technical regulation” within the meaning of Annex 1.1. Instead, in the context of the present case, we attach significance to the fact that, while it is possible to sell tuna products without a “dolphin-safe” label in the US, any “producer, importer, exporter, distributor or seller” of tuna products must comply with the measure at issue in order to make any “dolphin-safe” claim.”⁴⁵⁷

In addition, it took note that the AB characterized the EC measure at issue in *EC-Sardines* as a “technical regulation”. The measure at issue in *EC-Sardines* was a regulation setting out a number of prescriptions for the sale of “preserved sardines”, including the requirement that they contain only one named species of sardines, to the exclusion of others. Under the

⁴⁵⁶ AB report, *US-COOL*, para. 196.

⁴⁵⁷ AB report, *US-COOL*, para. 196.

facts of the case, it was possible to sell other species of sardines on the EC market, provided that such sardines were not sold under the appellation “preserved sardines”. The AB stated that the fact that the EC regulation was determined to be a “technical regulation” was supportive of its view that the mere fact that it is legally permissible to sell a product on the market without using a particular label is not determinative when examining whether a measure is a “technical regulation”.⁴⁵⁸

5.5.2 An approach based on “de jure” and “de facto” criteria

Concerning the meaning of “mandatory” compliance, both disputing parties as well as the Panel including the dissenting panel all use the terms “de jure” and “de facto” and try to incorporate those concepts in explaining their respective arguments and findings. They all seem to assume that the concept of mandatory compliance is comprised with both *de jure* compulsory situation and *de facto* compulsory situation.

Mexico claimed that it has been made compulsory by law to use only the dolphin-safe label designated by the US provisions; and, alternatively, the US measures, in fact, restricted retailers, consumers and producers to a single choice for labelling tuna products as dolphin-safe. The US does not directly reject the Mexico’s approach of considering both *de jure* and *de facto* mandatory compliance of the measure. However, the US warns against determining *de facto* mandatory character solely based on private actors’ preference; its position is that some form of government action is also required to make a measure *de facto* obligatory.

The differing opinion by one of the Panel members also examines the binding character of the US measure from the perspective of both concepts. First, it interprets the notion of “mandatory” compliance as impossibility of marketing the product without the label at issue. Then, it incorporates two fundamental sources of the resulting impossibility to market: (1) direct prohibition by law and regulations and (2) indirect prohibition by influence of some government actions. The former constitutes *de jure* cause and the latter constitutes *de facto* cause. It further explains method of analysis and components of each concept. With respect to *de jure* concept, it considered whether the requirement to label a tuna product

⁴⁵⁸ AB report, *US-COOL*, para. 198.

before being offered for sale in market was directly imposed by the measure itself, for instance, by relevant regulations or by the market preference, i.e., preferences of producers or consumer. Even if the impossibility of marketing tuna products is not caused by relevant law or regulations, such impossibility could be indirectly caused by some other government actions.

The majority opinion of the Panel seems to endorse the *de jure/ de facto* approach. It notes the two alternative arguments submitted by Mexico and then decides to consider those “two aspects in turn, without prejudice, at this stage of our analysis, to the question of whether *de facto* “mandatory” compliance is covered by Annex 1.1.”⁴⁵⁹ Then, the Panel stated that the *de jure* compulsory character could be determined from the examination of the terms or structure of the measures themselves.

Accordingly, the Panel examined various aspects of the measure itself, whether the relevant provisions of the measure at issue regulate or prescribe certain product characteristics, whether they do so in a binding and exclusive manner, whether they imply no possibility or alternative means except in compliance with the criteria set out in the measures, and whether the measures prescribe in a positive form or in a negative form.

After reviewing all these relevant questions, the Panel finally concludes that the measure at issue establishes *de jure* mandatory labeling requirements. Then, the Panel considers it unnecessary to further its examination to find *de facto* obligatory character of the measure at issue. Thus, the Panel terminates its analysis without further explaining how it defines *de facto* mandatory concept and what components it should consider in an actual review.

Therefore, unlike disputing parties’ assertions and one panel’s separate opinion, the Panel rigorously focused on the measure itself and considered various aspects of it when it applied *de jure* approach and finally determined the compulsory character of the measure only within the meaning of *de jure* concept.

The AB’s approach seems to be significantly different from all the others’. Although the disputing parties and the Panel members tried to apply *de jure* and *de facto* approach to determine whether compliance with the measure at issue was mandatory within the meaning of Annex 1.1, only the AB did not expressly mention such concepts. Instead, the AB

⁴⁵⁹ Panel report, *US-Tuna II*, para. 7.113.

suggested four main criteria to examine, all of which seem to be quite strictly related to the measure itself.

The AB's examination criteria are almost identical with the set of components the majority Panel has considered with the *de jure* approach. They were questions of whether the measure consists of a law or a regulation enacted by a WTO Member, whether it prescribes or prohibits particular conduct, whether it sets out specific requirements that constitute the sole means of addressing a particular matter, and the nature of the matter addressed by the measure.⁴⁶⁰ It can be inferred from those specific components that the AB's review approach is closer to a *de jure* approach than to a *de facto* approach.

5.5.3 An approach based on “exclusivity” criterion

One most critical criterion that led both the Panel and the AB finally to conclude that the US labelling scheme was a technical regulation was the fact that the measure provided “exclusive means” of asserting a dolphin-safe status for tuna products. The Panel took note that the US measure left “no discretion to resort to any other standard” to inform consumers about the dolphin-safe characteristic of the product.⁴⁶¹ In specific, the Panel found that the US labelling provisions set out “certain requirements that must be complied with in order to make any claim relating to the manner in which the tuna contained in tuna product was caught, in relation to dolphins.”⁴⁶²

The AB also examined this criterion, i.e., whether the US measure sets out specific requirements that constitute the sole means of addressing a particular matter, and considered the result of this analysis very importantly. The AB found that the US measure is composed of legislative and regulatory acts of the US government and the measure establishes “a single and legally mandated definition of a “dolphin-safe” tuna product and disallows the use of other labels on tuna product that do not satisfy the definition. The AB, then, paid specially attention to the “ways” or the “manner” in which the measure applied the conditions to allow the use of the term “dolphin-safe”. Then, it found that the US measure prescribed “in a

⁴⁶⁰ Appellate Body, *US-Tuna II*, para. 188.

⁴⁶¹ Panel report, *US-Tuna II*, para. 7.143.

⁴⁶² Panel report, *US-Tuna II*, para. 7.143.

broad and exhaustive manner” that apply for making any assertion as to “dolphin-safety” and that, as a consequence, the US measure “covered the entire field of what “dolphin-safety” means in relation to tuna products.”

In sum, it can be inferred that the “mandatory” character of a certain measure is also constituted by its manner of application. If the measure imposes or prescribes what conditions a product must possess or not to possess “in an exclusive way” or allows only one way but disallows all the other ways, thus covering the entire field of the matter, then such compliance condition would be considered “mandatory”.

Also, this “exclusivity” approach seems to be determinative even in the context where it is possible to sell tuna products without a designated label or a product characteristic. The exclusivity approach examines whether the product must comply with the measure in order to use the label or make any relevant claim that it has acquired the product characteristic.

5.6 Chapter Summary and Partial Conclusion

Chapter 5 analyzed the current interpretation and application of the definitions of ‘standard’ and ‘technical regulation’. It finds that the definition of ‘standard’ is quite limitedly applied in disputes to date, being interpreted only in the context of “a relevant international standard” as provided in Article 2.4 of the TBT Agreement. There has been no dispute in which ‘standard’ was interpreted solely for the sake of determining ‘standard’ itself. Also, interpretations of “international standard” were found to be inconsistent in disputes. In a dispute, ‘standard’ as a part of “international standard” was reviewed based on the definition of the TBT Agreement but, in another dispute, the phrase “international standard” was examined based on the definition in the ISO/ECE Guide.

In addition, the vague concept of “voluntary/mandatory” compliance was one of the most critical legal issues in recent *US-Tuna II* dispute. Views and arguments were sharply divided regarding its interpretation. Therefore, Chapter 5 analyzes the current interpretation and application of the definitions of ‘standard’ and ‘technical regulation’.

First, it finds that the definition of ‘standard’ is quite limitedly applied in disputes to date,

being interpreted only in the context of “a relevant international standard” as provided in Article 2.4 of the TBT Agreement. There has been no dispute in which ‘standard’ was interpreted solely for the sake of determining a ‘standard’ itself. Also, interpretations of “international standard” were found to be inconsistent in disputes. Sometimes, ‘standard’ was reviewed as a legal element of “international standard” based on the definition of the TBT Agreement but, in other times, the phrase “international standard” was examined exclusively based on the definition in the ISO/ECE Guide.

The second part of the chapter examines the legal interpretations and the consequent determination of a ‘technical regulation’, which is basically composed of reviews on three legal elements, “identifiable product or group of products”, “lays down product characteristics” and “mandatory compliance”. In particular, the concept of “mandatory compliance” as interpreted in this context is very important since the criterion also affects the concept and regulatory scope of ‘standard’. The concept has rarely been a core legal issue in disputes. However, the disputants in a recent case had substantially different views from each other surrounding the meaning of “mandatory/voluntary compliance” and even the adjudicating bodies like panels and the AB submitted significantly diverging opinions. The analysis shows that the AB considered the “exclusivity” criterion most important for determining the “mandatory/voluntary compliance” concept. The chapter additionally analyzes the major approaches found in disputes, i.e. “market sales condition” approach, “de jure/de facto” approach and “exclusivity” approach, and finds that the adjudicating bodies have overly relied on a strict textualist approach in interpreting the concept “mandatory compliance”.

Chapter 6. Revisiting ‘Standard’ in the TBT Regime

6.1 Revisiting the Legal Characterization Review of ‘Standard’

After all, international trade has long been affected by national technical regulations and standards and is increasingly so in recent years as the global society becomes more aware of and concerned about problems of consumer safety, health risks or environmental hazards. The WTO calls these global trade problems caused by *standards* and standardization as ‘technical barriers’ and grasps them through three different sources, i.e. ‘technical regulation’, ‘standard’ and ‘conformity assessment procedure’. The distinction between the first two and ‘conformity assessment procedure’ seems to be straightforward. The former two are substantive *standards* while the latter is procedural *standards*. The distinction between the two substantive standards, however, does not appear to be clear-cut by their concepts and in practice since their definitions are not sufficiently specific.

Even before the issue of legal ambiguity and the challenge of distinguishing the concepts of the two, there exists a question of how to perceive the category of ‘technical regulation’ and the category of ‘standard’ in the first place. Should they be treated as sub-categories of one large category such as technical specification or *standards* in general term? Or should they be treated as two separate categories, one being a part of government regulation and the other being a part of general consensus or practice? Or should one of them be understood to encompass the other, ‘technical regulation’ being a special type of ‘standard’?

One way to address these conceptual questions of defining the external boundaries of ‘technical regulation’ and ‘standard’ as well as the relation between the two is to consider their historical development, particularly their first inception and early discussions. Implication from this historical context will help understand the current architecture of the

TBT Agreement - the architecture which has been established to deal with trade-restrictive standards -and the current definition of the two causes of technical barriers from a developmental perspective.

In the current TBT Agreement, Annex 1 entitled “Terms and Their Definitions for the Purpose of This Agreement” provides for definitions of 8 terms and concepts for the purpose of the Agreement. Besides these Agreement-specific terms and concepts, definitions of all other terms will have the same meaning as given in the sixth edition of the ISO/IEC Guide 2:1991. Among the 8 concepts specifically defined in the Annex, the term ‘technical regulation’ and the term ‘standard’ are included. This means that the Agreement will establish its own definitions and concepts of ‘technical regulation’ and ‘standard’ for its own purpose, regardless of what their corresponding meanings are in the ISO/IEC Guide 2:1991.

The definition of ‘standard’ has some similar legal elements with the definition of ‘standard’. The first identical element is *document*; both of the definitions contain the word *document* and they are basically *documents*. The second common element is that they are documents which *lay down or provide* such subject matters as *product characteristics or processes and production methods*. The third common feature is the fact that both talk about the compliance obligation, whether it is a mandatory type or not-mandatory type. Overall, both definitions is based on a very similar sentence structure, “document” which “lays down /provides” subject matters like “product characteristics” or “processes and production methods”, and compliance obligation with the document may be either “mandatory” or “not mandatory”.

Nevertheless, the definition of ‘standard’ is also composed of some different elements from that of ‘technical regulation’. For instance, the document of ‘standard’ needs *approval by a recognized body*, it is applicable to *rules or guidelines* as well as products and PPMs, and the purpose of ‘standard’ should be *for common and repeated use*.

Then, were they originally different and separate categories that created technical barriers to trade? If this is true, an examination of the Agreement’s development history will reveal that their definitions were different in the beginning but have developed to be similar to each other throughout negotiations. Or, were they two different subsets of a kind? If this is true, a historical review of the Agreement will show that their definitions were initially almost identical to each other but have evolved to be different in some other aspects.

The following section considers these hypotheses. It first analyzes the developmental process of the concept ‘standard’ by comparing its textual definition with its corresponding definition of ‘technical regulation’. Then, it suggests a more proper approach to understanding the concept ‘standard’ and its implications for the current review process of legal characterization in dispute.

6.1.1 Implications from the conceptual development of ‘standard’

6.1.1.1 Implications from the analysis of “standard” in the 1973 Draft *Standards Code*

The 1973 Draft Code, the earliest available proposed draft, uses the term “standard” and divides the concept into two categories, “mandatory standard” and “voluntary standard”. As the terminologies imply, “mandatory standard” corresponds to the current ‘technical regulation’ and “voluntary standard” to the current ‘standard’. Terminologies themselves probably represent quite a simple structure. There is “standard”, one source of technical barriers to trade, and all “standards” are categorized into two groups by their compliance obligation, namely, “mandatory standard” group on one hand and “voluntary standard” group on the other.

Then, Annex 1 to the 1973 Draft Code defines the three terms, “standards”, “mandatory standards” and “voluntary standards”. This means that all the common legal elements of “mandatory standards” and “voluntary standard” are described in the definition of “standards” while their distinctive features and legal elements are stipulated in each respective definition of “mandatory standards” and “voluntary standard”. A close examination of the “voluntary standard” definition reveals that one primary determinative element between “mandatory standards” and “voluntary standards” is their “legal obligation to comply”.

However, further examination of other definitions and the regulatory structure of the Draft Code show that characteristics of standards bodies also play equally critical role in delineating the entire coverage of “standards” as well as distinguishing the scope of “voluntary standards”

from that of “mandatory standards”. The “mandatory standards” definition provides that the mandatory obligation to comply be “by virtue of an action of an authority endowed with the necessary legal power”. This probably means that the determinative “legal obligation to comply” should be given by “an action of an authority endowed with the necessary legal power”. Then, which is such an authority? The regulatory structure of the Draft Code seems to give the answer. The titles of Article 2 and Article 3 imply that “mandatory standards” prepared, adopted or used by central government bodies, local government bodies and other regulatory bodies are only within the scope of the subject matter “mandatory standards”. The title of Article 4 and the definition of “voluntary standards body” indicates that the scope of “voluntary standards” is limited to “non-government organization which prepares them for public use”. Overall, a substantial discrepancy exists between the conceptually broad coverage set out in the definition of “standard” and the resulting regulatory scope based on relevant definitions and Articles as shown in Figure 4. Nevertheless, the concept of “voluntary standards” and the concept of “mandatory standards” were tied up together under the concept of “standards”, sharing all aspects and features together except for the legal element of “legal obligation to comply” conferred only by government standards bodies. Therefore, it can be inferred that the Draft Code considers the category of “mandatory standards” a partial form of government regulations and the category of “voluntary standards” a partial form of private standards. The distinction and the meaning of “legal obligation to comply” of the Draft Code is, thus, unambiguous, despite the fact that the regulatory scope of “standard” under the regime is quite limited.

6.1.1.2 Implications from the analysis of “standard” in the *Standards Code*

After the Tokyo Round negotiation, the so-called Standards Code was adopted and had been effective until the adoption of the current WTO TBT Agreement. The Standards Code uses the term “technical specification” instead of “standards” as used in the 1973 Draft Code and divides the concept into two categories, “technical regulation” and “standard” instead of roughly corresponding respective terms of “mandatory standards” and “voluntary standards” as used in the early Draft Code. The changes in terminology were largely due to influence

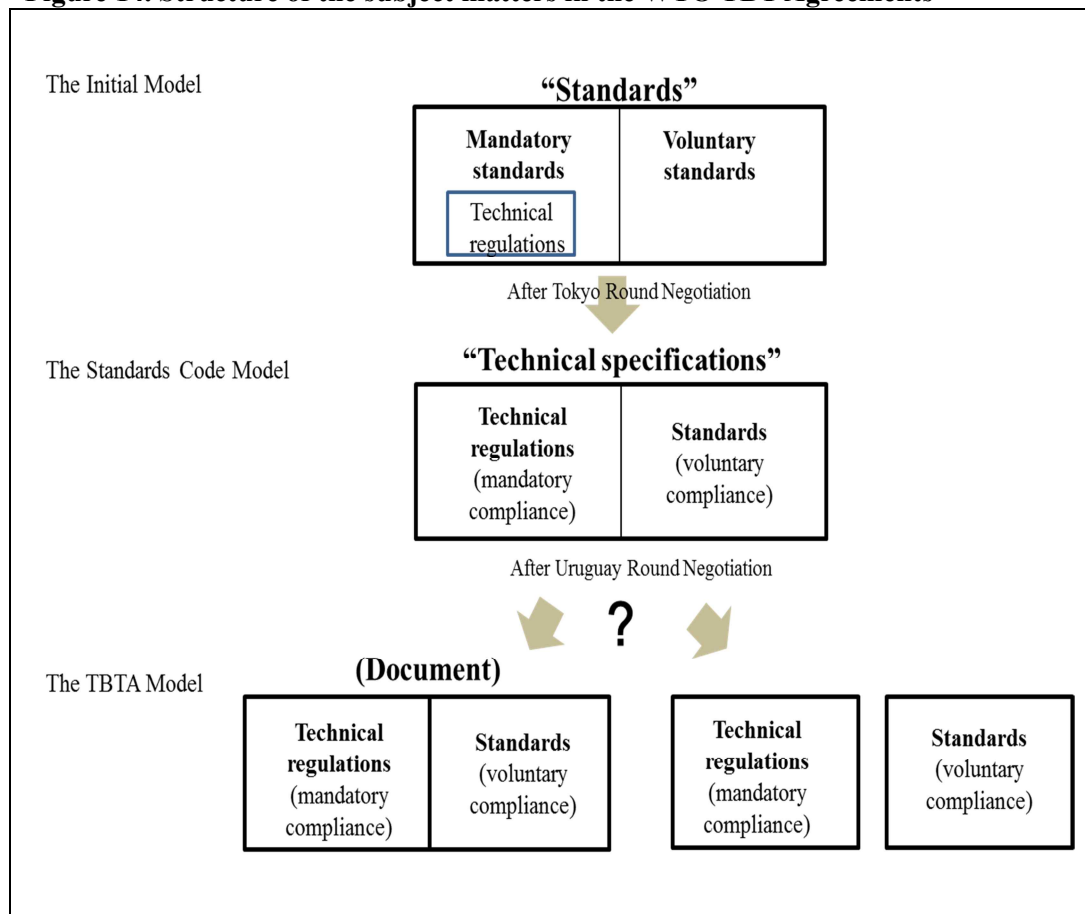
by the contemporary development of terminologies and their normative definitions by the ISO/ECE Guide. Besides, the relations between these three concepts are pretty much the same as those represented in the 1973 Draft Code. Annex 1 to the Standards Code, likewise, provides definitions of these three respective terms. Under the regime of the Standards Code, there is “technical specification” as one source of technical barriers to trade, which the Standards Code intends to address, and it is again categorized into two groups of “technical regulation” and “standard” depending on their compliance obligation.

Similarly with the 1973 Draft Code, an analysis of their definitions leads to a conclusion that a primary determinative legal element between the category of “technical regulation” and the category of “standard” is still a mandatory character of its compliance. Both definitions correspondingly state that compliance with “technical regulation” is *mandatory* whereas compliance with “standards” is *not mandatory*.

However, unlike the 1973 Draft Code regime, the adjective “legal” is no longer used in the definition of “standard”. Nor does the definition of “technical regulation” contain the phrase “by virtue of an action by an authority endowed with the necessary legal power” any longer. However, it is noted that the regulatory structure of the Standards Code continues to limit the scope of “technical regulations” to works of government bodies and regulatory bodies. It is additionally noted that the term “non-governmental body” has been newly adopted and is defined as “[a] body other than a central government body or a local government body, including a non-governmental body which has legal power to enforce a technical regulation”. In other words, from this definition of the new term, it can be clearly inferred that governmental or regulatory bodies should be endowed with “legal power to enforce technical regulations” and that the ambiguous phrase of just “mandatory” obligation to comply perhaps is perceived by the “legal power” of their government and regulatory bodies.

The entire regulatory coverage of “technical specification” has now expanded from the regulatory scope of the previously corresponding concept “standards” of the 1973 Draft Code. Specifically speaking, the regulatory structure of the Standards Code perhaps indicates that the scope of “standards” is no longer delimited in terms of their non-governmental standards bodies because Article 2 and Article 3 are now intended to be partially applied to standards prepared, adopted and used by central and local government bodies and regulatory bodies in addition to Article 4 which continues to govern standards by non-government bodies.

Figure 14. Structure of the subject matters in the WTO TBT Agreements⁴⁶³



Source: Author's analysis based on the implications from Chapter 4

In sum, in the Tokyo Round Standards Code, the meaning of "mandatory compliance" becomes more ambiguous due to the omission of the word "legal" in relevant definitions but is still hinted by some requirements to their standards bodies to possess legally enforceable power. Furthermore, the regulatory coverage of the term "technical specification" has expanded since the bodies of "standards" now encompass a broader range, which includes

⁴⁶³ For the purpose of this thesis, only the substantive subject matters of the TBT Agreement are considered. The category of conformity assessment procedure, procedural subject matter is not considered.

non-government bodies to central and local government bodies, to regulatory bodies.⁴⁶⁴

<Figure 14> shows the development of outer boundaries embracing the entire scope of the TBT Agreement and the inner distinction between the two exclusive sub-categories. The historical development of the TBT Agreement shows the concept of “standards” and the concept of “technical regulations” have thus evolved together throughout the negotiating history, but that evolution was within a larger boundary of some general concept such as “standards” in the 1973 Draft Code or “technical specifications” in the Standards Code. In other words, the TBT Agreement has consistently established a broad boundary that probably encompasses the largest extent of scope, and then has defined the two specific categories. It was only after the Uruguay Round that this entire scope has become blurred. The TBT Agreement uses the word “document” to define both technical regulations and standards but does no longer provide any definition of “document” for the purpose of the TBT Agreement.

6.1.2 Legal evidence from the analysis of ‘standard’ in the WTO TBT Agreement

The conceptual development of the large category in negotiation history shows that the elements of the outer boundary have remained unchanged and almost identical with the corresponding term in the ECE/ISO definitions. As explained in Chapter 4 of this thesis, in the 1973 Draft Code, the definition of “standards” was “any specification which lays down some or all of the properties of a product in terms of quality, purity, nutritional values, performance, dimensions, or other characteristics.”⁴⁶⁵ In the ECE/ISO definitions, the corresponding term “technical specification” was defined as “[a] document which lays down characterization of a product or a service such as levels of quality, performance, safety,

⁴⁶⁴ See <Table 11> of this thesis. Roughly, the two definitions are compared in the following: the definition of “voluntary standards body” in the 1973 Draft Codes says, “[t]his term means any non-governmental organization which prepares voluntary standards for public use...” while the definition of “standardizing body” in the Standards Code provides, “[a] governmental or non-governmental body, one of whose recognized activities is in the field of standardization.”

⁴⁶⁵ Supra note 134.

dimensions.”⁴⁶⁶ In the Tokyo Round Standards Code, the definition of “technical specification” was “a specification contained in a document which lays down characteristics of a product such as levels of quality, performance, safety or dimensions.” All the definitions identically state in the second sentence, “it may include... terminology, symbols, testing and test methods, packaging, marking or labeling requirements”. Also, the GATT/WTO TBT Agreements has excluded services and codes of practice from the very beginning.

In general, the outer boundary is delineated based on a set of elements such as “specification”, “which lays down characteristics (or properties) of a product”, “such as quality, performance, safety or dimensions”, inclusion of additional subject matters like terminologies and labeling requirements and exclusion of services.

This outer boundary had been a common scope for both ‘technical regulations’ and ‘standards’ until the adoption of the WTO TBT Agreement. However, during the Uruguay Round, any corresponding term to “technical specification” in the Standards Code was deleted and each definition of technical regulation and standard in the WTO TBT Agreement commonly uses the term “document” without defining what it means. Thus, the outer boundary has become less clear under the WTO TBT Agreement regime than under the previous regimes.

In *US-Tuna II*, the Appellate Body noted the term “document” in the definition of “technical regulation” and looked it up in the Oxford English Dictionary. It explained that the word “document” is defined quite broadly as “something written, inscribed, etc., which furnishes evidence or information upon any subject” and concluded that it covers “a broad range of instruments or apply to a variety of measures” which, then, is narrowed by other elements in the definition such as “lays down product characteristics”, and “mandatory compliance”.⁴⁶⁷ Despite its wide acceptance, the textual approach taken by the Panel seems to have reached a quite limited interpretative result. As defined in the dictionary, “document” itself indicates some form, not the substance.

The development of the outer scope and the conceptual development of the terms “technical regulation” and “standard” studied in the previous Chapter of this thesis, however,

⁴⁶⁶ Supra note 194.

⁴⁶⁷ Appellate Body report, *US-Tuna II*, para. 185.

implies more clearly the context and probably the intention of the early drafters for having those concepts in the TBT Agreement.

As mentioned earlier, the outer boundary had been determined, before the WTO TBT Agreement, by major elements like “specification”, “which lays down characteristics (or properties) of a product”, “such as quality, performance, safety or dimensions”, “including terminology, symbols, testing and test methods, packaging, marking or labeling requirements”. In the WTO TBT Agreement, these elements are all present in the definition of “technical regulations” while no corresponding term to “technical specification” as defined in the Tokyo Round Standards Code is present.

This implies that the outer scope is now delineated through some elements of the “technical regulation” definition, rather than through the definition of any separate general term like “technical specification”. This further implies that, just like in any other Draft Code or the Tokyo Round Standards Code, these elements found in the definition of “technical regulations” should also be applied to the concept “standards” and should be commonly shared for the scope of “standards”.

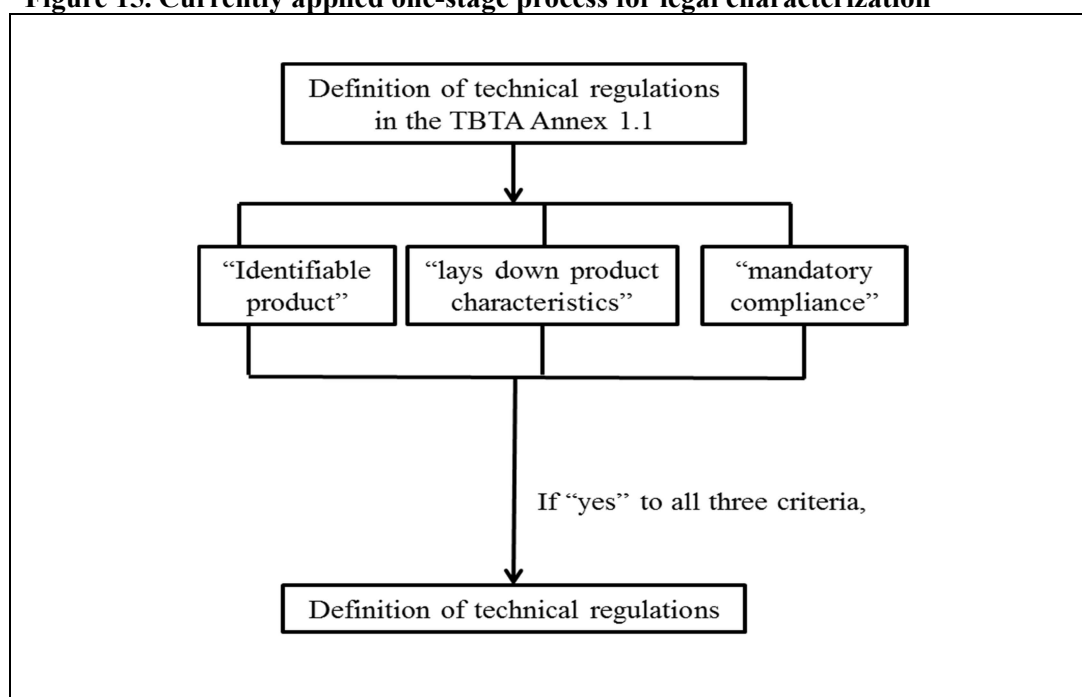
6.1.3 A suggestion on a two-stage review process for the legal characterization of a ‘standard’

The findings that the category of “standards” and the category of “technical regulations” are in parallel with and exclusive to each other within a larger outer boundary logically lead to the conclusion that determination of a “technical regulation” inevitably accompanies determination of “not a standard” and vice versa. Since a “technical regulation” and a “standard” are defined separately, there are, in theory, two ways to make one conclusion. For example, in order to find out whether a specific document is a technical regulation or not, one may examine the definition of “technical regulation” and determine a “technical regulation” following a positive finding of mandatory compliance; or one may examine the definition of “standard” and determine a “technical regulation” following a negative finding of mandatory compliance. In principle, both ways should produce an identical determination. This is because, as explained in the previous two sections, the categories of “technical

regulations” and “standards” share a common outer boundary and differ only in the binding character of compliance.

The review criteria which have been generally established in jurisprudence are based on the definition of “technical regulations”. In a majority of disputes, the parties disputed over Article 2 of the TBT Agreement and determination of a “technical regulation” has been considered a “threshold” issue. Based on the definition of “technical regulation, panels and the AB have established as a general rule that there are three elements to consider, namely, (1) whether the disputed measure applies to an “identifiable product”; (2) whether the disputed measure “lays down product characteristics”; and (3) whether compliance with the disputed measure is mandatory. Only in case where all these three elements are satisfied, a “technical regulation” can be determined as shown in the flow chart in Figure 15.

Figure 15. Currently applied one-stage process for legal characterization



Source: Author’s analysis based on the panels’ and the AB’s interpretations in disputes

However, this legal characterization review process applied in actual dispute cases is not

consistently applied. For example, the Panel in *US-COOL* examined “mandatory compliance” criterion first, “identifiable product” criterion second, and then “lays down product characteristics” criterion last, the order of which is quite departing from what is commonly applied. Especially, it is noted that the Panel examined in accordance with the following order: (a) whether compliance with the COOL measure and the Vilsack letter is mandatory⁴⁶⁸; (b) whether the COOL measure applies to an identifiable product or groups of products⁴⁶⁹; and (c) whether the COOL measure lays down one or more characteristics of the product⁴⁷⁰. Therefore, the Panel examined the legal element of “mandatory compliance” first and then considered the other two elements, which is quite an opposite order to the review steps in other disputes.

Another relevant example is the AB’s review process in *US-Tuna II*. In response to an appeal concerning the “mandatory” character of the compliance with the measure at issue, the AB preceded an examination, the content of which is somewhat mixed up or overlapping with the analysis of the “product characteristic” criterion. To be specific, the AB’s review was in the order of (a) interpretation of Annex 1.1 to the TBT Agreement and (b) whether the measure at issue constitutes a technical regulation.⁴⁷¹ In the process, the AB did not particularly address the legal element of “mandatory compliance” but it went through the other two criteria and two additional criteria in order to determine “mandatoriness” in each of the criteria, which seem quite unorganized and unclear.

The three criteria are all drawn out from the definition of ‘technical regulation’ but they originate from different definitions in the previous drafts and each of them has its own purpose and implication. Specifically, the criterion “identifiable product” probably has a function of testing whether the measure at issue is concerning *product*, not *service* or *service* characteristics. The criterion “lays down product characteristics” examines whether the measure is a kind of the Agreement’s general subject matter *standards* or *technical specifications*. These two criteria ask whether a measure at dispute and the matter addressed by the measure are subject to the application of the TBT Agreement in general. Then, the

⁴⁶⁸ Panel report, *US-COOL*, paras. 7.149-7.197.

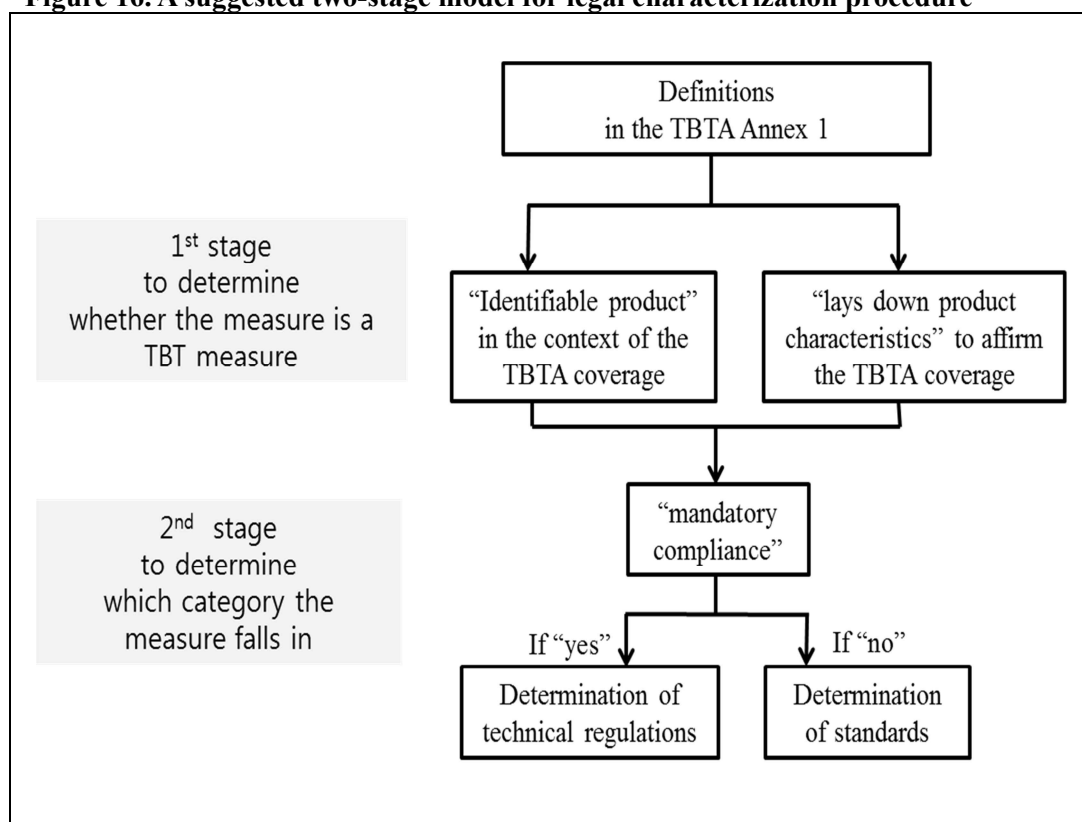
⁴⁶⁹ Panel report, *US-COOL*, paras. 7.198-7.208.

⁴⁷⁰ Panel report, *US-COOL*, paras. 7.209-7.217.

⁴⁷¹ Appellate Body report, *US-Tuna II*, paras. 190-199.

third criterion “mandatory compliance” plays important roles in distinguishing ‘technical regulation’ and ‘standard’ and subsequently determining which rules and procedures to apply.

Figure 16. A suggested two-stage model for legal characterization procedure



Source: Author’s analysis based on the implications from Chapter 5

Therefore, a conceptually more appropriate review procedure of legal characterization should be composed of two large stages. The first stage must seek the objective of determining whether a document or a measure at issue falls within the entire scope of the TBT Agreement. Therefore, in this stage, the first two criteria – the criterion “identifiable product” and the criterion “lays down product characteristics” – should be tested. Then, in the second stage, the question of which source of technical barriers to trade is at hand should be considered through an analysis of the criterion “mandatory compliance”. The purpose of the

second stage is to distinguish between ‘technical regulation’ and ‘standard’ and to subsequently decide upon which set of provisions is applicable. <Figure 16> summarizes the suggested two-stage model of legal characterization procedure.

The suggested two-stage model is more desirable for a dispute situation in which one party argues that the measure at issue is a “technical regulation” and the other party claims that it is a “standard”. Such a dispute case would be quite distinctive from a dispute in which both parties do not disagree over the legal characterization of a measure at hand but the adjudicating body must proceed to consider this threshold legal issue. In the former case, a determination of a ‘technical regulation’ inevitably implies a determination of a non-‘standard’ and a determination of a non-‘technical regulation’ will necessitate a subsequent text to determine a ‘standard’. In the latter case, on the contrary, a determination of a ‘technical regulation’ or ‘standard’ will affirm the application of the TBT Agreement and a determination of non-‘technical regulation’ or non-‘standard’ will automatically nullify the applicability of the Agreement.

In fact, one of the legal issues in *US-Tuna II* was surrounding this threshold issue. As explained above in Chapter 5.4, Mexico, the complainant, claimed that the US dolphin-safe labeling scheme was a mandatory “technical regulation” within the meaning of the TBT Agreement while the US, the defendant, argued that the US measure was a voluntary “standard”. In the case, the Panel and the AB applied the first model with three criteria drawn from the definition of “technical regulation”: (1) identifiable product; (2) lays down product characteristics; and (3) mandatory compliance. In such a dispute, if the adjudicating body had concluded that the measure at issue was not a mandatory ‘technical regulation’, then the examination does not stop there and this does not imply that the TBT Agreement is not applicable. Instead, such a determination in turn would imply that the Agreement is still applicable but a different set of provisions is now applied. In other words, ‘standard’ rules and procedures are applied rather than ‘technical regulation’ rules and procedures.

6.2 Revisiting the Concept of “Mandatory” Compliance

6.2.1 General applicability of the four criteria for the concept of “mandatory/voluntary” compliance

The binding character of their compliance is one critical element that distinguishes ‘standards’ from ‘technical regulation’. If compliance is voluntary, such specifications will be treated as “standards” for the purpose of the TBT Agreement. If compliance is mandatory, such specifications will be considered as “technical regulations”. However, the concept of “mandatory compliance” is not based on concrete legal definitions and thus fairly ambiguous in its application.

A few disputes involved the threshold issue of legal characterization and rigorously reviewed the concept of “mandatory compliance”. In *US-COOL*, the Panel tested whether the so-called Vilsack letter, allegedly one constituent of the US labeling system, was not mandatory to comply, thereby not constituting a technical regulation.⁴⁷²

In *US-Tuna II*, the legal issue of interpreting the concept “mandatory/voluntary compliance” was one of the core issues of the dispute. As illustrated in Chapter 5.4 and Chapter 5.5 which analyzed the divergent opinions over the issue, the disputants, third parties, panels and the AB all had different views from each other, and the panel reached no consensus among themselves. The Panel’s determination of a “technical regulation” was appealed by the US⁴⁷³ and, accordingly, the AB analyzed the compliance character of the US dolphin-safe labeling scheme based on the following four criteria: “(1) whether the measure consists of a law or a regulation enacted by a WTO Member; (2) whether it prescribes or prohibits particular conduct; (3) whether it sets out specific requirements that constitute the sole means of addressing a particular matter, and (4) the nature of the matter addressed by the measure”.⁴⁷⁴ These four criteria that the AB introduced to determine the “mandatoriness” are summarized in <Table 18>.

⁴⁷² Panel report, *US-COOL*, paras. 7.163-7.197.

⁴⁷³ AB report, *US-Tuna II*, paras. 11-18.

⁴⁷⁴ AB report, *US-Tuna II*, para. 188.

Table 18. Analytical criteria and a summary of their limitation to be generally applied to determine mandatoriness and voluntariness

Analytical criteria	Mandatoriness	Voluntariness
<u>Criterion 1.</u> Whether it was enacted by law	Mandatory TRs are enacted by law.	Voluntary standards are “not” enacted by law. (X)
<u>Criterion 2.</u> Whether it prescribes, prohibits, regulates certain product characteristics	Mandatory TRs prescribe, prohibit or regulate certain product characteristics.	Voluntary standards do “not” prescribe, prohibit or regulate certain product characteristics. (X)
<u>Criterion 3.</u> Whether it provides “only and exclusive means” to express certain product characteristics	Mandatory TRs provide “only and exclusive means” to express certain product characteristics.	Voluntary standards provide or allows “multiple or inclusive means” to express certain product characteristics. (?)
<u>Criterion 4.</u> Nature of the matter addressed by the measure	Not sufficiently clear (?)	Not sufficiently clear (?)

Source: Author’s analysis

In *US-Tuna II*, the legal issue of characterizing the measure and, thereby, determining the applicability of Article 2 of the TBT Agreement was based on two claims: on the one hand, the complainant argued that the US measure at dispute was a “technical regulation” within the meaning of the TBT Agreement and, on the other hand, the responding US claimed that the measure in question was not a “technical regulation” but a “standard” defined in the Agreement. Therefore, the result of the Panel and the AB’s examination must involve either of a finding that the measure in question is a “technical regulation” but not a “standard”, or of a finding that the measure is not a “technical regulation” but a “standard”. In other words, the criteria the Panel and the AB applies must be, in principle, determinative for distinguishing a “technical regulation” from a “standard” and vice versa.

In general, it is true that case-by-case approach is employed by the WTO adjudicating body when reviewing a dispute and, therefore, finding and ruling cannot be generalized and applied to other cases with equal weight. Notwithstanding this general rule of dispute examination, the AB’s four criteria for analyzing the mandatory compliance obligation may provide a good

starting point for addressing the unclear concept of mandatory/voluntary compliance and finding a determinative element for defining the concept.

However, a tested hypothesis in this analysis is that if positive findings to the four criteria serve determinative evidence for characterizing a measure as a ‘technical regulation’, then negative findings to them would logically lead to determination of a “voluntary” ‘standard’ if and only if at least one of the four criteria is a sufficient condition. In this section, this hypothesis is tested. The result of the analyses on each of the criteria generally lead to a conclusion that the criteria do not provide any determinative element to distinguish voluntary compliance from mandatory compliance. More precisely, the set of criteria falls short of providing a general rule to follow in legally characterizing a “technical regulation” from a “standard” or vice versa under the TBT Agreement regime. Instead, the analyses suggest that the criteria in fact have some limitations and inappropriate review process to be used as a general rule for the threshold analysis of legal characterization.

6.2.1.1 A criterion to be based on “enactment by law”

The first criterion applied by the AB in *US-Tuna II* to determine a “technical regulation” and its characteristics of “mandatory compliance” was the question whether the measure at issue was enacted by law. In its review, the AB first considered whether the measure at issue “consists of a law enacted by the US Congress and regulations pertaining to the use of the “dolphin-safe” label set out in the United States Code of Federal Regulations”.⁴⁷⁵ Subsequently, the AB affirmed that the measure was based on “legislative or regulatory acts of the US federal authorities.”

This criterion of testing whether a certain specification is based on the government authority’s legal enactment or implementing regulation can be a necessary condition for determining a “technical regulation”, but cannot be a sufficient condition. This is supported by reasons from two perspectives. One perspective involves the current definition of the term “technical regulation” in the WTO TBT Agreement considered in the context of its legal development in the GATT/WTO negotiating history. The other perspective is related to the

⁴⁷⁵ AB report, *US-Tuna II*, para. 191.

realities and practices in major countries.

First, as discussed in Chapter IV of this thesis, the legal definition of “technical regulation” has developed in a direction that removes conditions for its standardizing body. The requirement that the mandatory compliance be made by some legal enactment and legal enforcement by government or regulatory bodies appears in the earliest available draft codes but neither in the Tokyo Round Standards Code nor in the WTO TBT Agreement. The following several passages elaborate on the change in the negotiating history.

In the very early discussion to identify the problems of standards – i.e. standards in a general sense –, the negotiators noted that the role of government differed significantly in the field of standardization from country to country and both government bodies and private organizations were involved in the field of standardization.⁴⁷⁶ This led to the regulatory structure in the 1973 Draft Code for to incorporate three levels of standards bodies, namely, central, local, and non-government bodies.⁴⁷⁷

Nevertheless, it was additionally noted that “the area of voluntary standards were largely confined to industrial products. Safety and health regulations were usually compulsory”.⁴⁷⁸ Accordingly, the 1973 Draft Code defined the category of “mandatory standards”, which was later replaced by “technical regulations”, not only in terms of binding character of its compliance but also in terms of some characteristics of the standards body. In specific, it conditioned the compliance with mandatory standards be made compulsory “by virtue of an action by an authority endowed with the necessary legal power”.⁴⁷⁹ Consequently, only government bodies and regulatory bodies which were basically defined as bodies with legal power to enforce a mandatory standard were assumed to be able to prepared, adopt and use and, thus, were subject to the disciplines for “mandatory standards”. In contrast, the 1973 Draft Code defines “voluntary standards” partly in terms of their *voluntary standards body* which is, in turn, defined as “any non-governmental organization” including some “national standards bodies”. Thus, at this stage, the legal enactment and legal power to enforce on the part of the standards body were important elements for understanding the concept of

⁴⁷⁶ MTN/3B/3, para. 6.

⁴⁷⁷ See Chapter IV, Section 1.3.1.

⁴⁷⁸ Supra note 454.

⁴⁷⁹ COM.IND/W/108, 1973 Draft Code, Annex 1.2.

compulsory compliance.

However, such a description for the concept of mandatory compliance was removed during the Tokyo Round negotiation and the definition of “technical regulation” does not contain any description or condition to the requirement of compulsory compliance. The factor regarding standards body became less certain in definitions of “technical regulations”. Nevertheless, the regulatory structure and the definition of “non-government body” still indirectly referred to some characteristics of standards body and thus described ‘technical regulation’ in terms of their bodies although the link became weaker than before.⁴⁸⁰

Finally, in the WTO TBT Agreement, the respective definitions of technical regulations and standards do not contain any reference to the standards body and the regulatory structure no longer limit the scope of them in respect of their bodies. Thus, the factor of standards body became legally little relevant in determining the criterion “mandatory compliance”.

Second, in practice, national ‘standards’ are also based on general law and subject to legal enforcement just like national ‘technical regulation’. In general, the entitlement of “national” in national standards is supported by its basis on legal enactment or a general law. For example, “Korean Industrial Standards” or KS are allegedly to be voluntary national standards and they are prepared, adopted and applied by the Korea Agency for Technology and Standards, a government body under the auspice of the Ministry of Trade, Industry and Energy, based on the Industrial Standardization Act.⁴⁸¹ Furthermore, any deceptive use or any misuse of the KS marking is closely monitored and responded under the general national market surveillance scheme. Therefore, the fact that a standard is based on law and subject to enforcement mechanism does not necessarily imply that the compliance with such standard is mandatory. Ample evidence shows that national standards are based on law but they are still considered to be voluntary.

6.2.1.2 A criterion to “prescribe, prohibit, or regulate certain product characteristics”

The second criterion considered by the AB in *US-Tuna II* was related to the compulsory manner of the measure at issue. The AB tried to reaffirm a compulsory compliance manner

⁴⁸⁰ For more elaborated discussion, see Section 6.1.1.2 of this thesis.

⁴⁸¹ Korea Agency for Technology and Standards, <http://www.kats.go.kr/en_kats/standard/KAEU03_1.asp>

by looking at the fact that the measure regulated, prescribed, and prohibited certain product characteristics. For example, the AB found that the US measure conditioned eligibility for a “dolphin-safe” label based on certain documentary evidence, prohibited any reference to dolphins, porpoises, or marine mammals on the label and regulated by establishing “a single and legally mandated set of requirements making any statement with respect to the broad subject “dolphin-safety” of tuna product in the United States”.⁴⁸²

It is noted, however, that almost an identical examination had already been conducted when the AB was considering the second main legal criteria “lays down product characteristics”.⁴⁸³ As examined and suggested in Section 6.1, the first and second main criteria “identifiable product” and “lays down product characteristics” are separate from the criterion “mandatory compliance”.

Therefore, this criterion of considering whether a measure regulates, prescribes, or prohibits certain product characteristics in a compulsory manner is duplicative with the previous step for examining whether the measure “lays down product characteristics” regardless of its binding manner. The AB mentioned that this criterion was to review the measure’s compulsory manner and this differently intended goal of the review may have entailed different content from the previous examination of the element “lays down product characteristics”. However, the AB’s analysis does not contain any such distinctive feature. Consequently, this criterion provides no crucial standard for distinguishing technical regulations from standards in respect of their compliance manner.

Meanwhile, it may be questioned whether it is necessary to apply the same legal element of “lays down product characteristics” to determine a “standard”. As discussed in Section 6.1, the definition of “standard” also contains this element; it defines a “standard” as “document... which provides... characteristics for products...”. Consequently, panels and the AB would also have to consider whether a document “provides”, “prescribes” or “prohibits”, a certain product characteristic in very much the same way as in the examination procedure for determining a technical regulation. Then, it is not sufficiently clear how to carry out an

⁴⁸² AB report, *US-Tuna II*, para. 193.

⁴⁸³ In general, panels and the AB examine whether the disputed measure defines, or prescribes in the positive form or prohibits in the negative form a certain characteristics. Likewise in *US-Tuna II*, the Panel had already found that the US scheme defined the conditions that must be met if a product was to bear a “dolphin-safe” label, and in so doing, it conveyed criteria to be fulfilled, thereby laying down “labeling requirements”.

examination under the second criterion applied by the AB.

6.2.1.3 A criterion of “only and exclusive means”

The third criterion that the AB considered was a question of whether the measure at issue provided a single and exclusive means of indicating the subject product characteristics. The AB found that the measure at issue, in effect, established a single definition of “dolphin-safe” and covered the entire field of what “dolphin-safe” means in relation to tuna products in the US and finally concluded that the compliance with the US labelling scheme was compulsory. However, this criterion serves only a case-specific condition and cannot be generally applied to definitively affirm “mandatory compliance” because of the following reasons.

First, the AB explanation was that the compliance with the US labeling scheme was mandatory because it set out a single way or only one way to claim dolphin safety on tuna products. Then, if a measure requires only one way to use a product characteristic, does this single method per se constitute the mandatoriness? It may not. In other words, there can also be a government scheme under which multiple ways use a certain product characteristic are suggested but compliance with the scheme be nevertheless compulsory. The concept of mandatory compliance cannot be determined by the number of choices allowed to conform to a certain product characteristic.

Second, the AB described that the US labeling scheme provided an exclusive way to make any claim on dolphin-safety, thus making this measure effectively prohibiting other alternatives, and emphasized that this particular characteristic of the scheme produces mandatory character of the compliance. To simply put, the AB considered existence of alternatives as an important factor for concluding that the disputed measure was “mandatory”. However, this approach seems to be inappropriate since the inherent characteristic of compliance and existence of alternatives are two different things. A measure can be compulsory, prohibiting or allowing other alternatives; a measure can also be voluntary, prohibiting or allowing other alternatives. If a measure provides for one method and prohibits all the other methods, then the measure can be perceived as an only available way. However, this fact alone does not transform the measure’s inherent type of compliance

obligation.

Another concern about this approach is that it is based on too flexible and thus too vague concept of exclusivity. Even under the same measure, exclusivity can exist or not exist, and such an existence virtually depends on the situation faced by the counterpart. For instance, if a government adopts a standard which prohibits use of all the other alternatives to indicate a certain product characteristic but allows only one designated way, then, if the AB's approach is applied, it would logically lead to a conclusion that such a measure is based on mandatory compliance and is, thus, a 'technical regulation' for the purpose of the TBT Agreement.

Now, suppose that this government signs a mutual recognition agreement with other governments, consequently allowing other alternatives designated in the mutual recognition agreement, would this new situation modify the previous determination of a 'technical regulation' into a finding of non-exclusive 'standard'? Since the mutual recognition arrangement in principle permits the exporters' conformity with their domestic technical regulations in the importer's domestic market, the previously exclusive 'technical regulation' would now be perceived as non-exclusive 'standards'.

Then, there comes another problem in the simulated case above. Producers and suppliers of non-parties to the mutual recognition agreement will continuously perceive the importing country's domestic measure exclusive to them. In other words, exporters in non-parties to the mutual recognition agreement will realize that, unlike the products of the exporters in the parties, their products are still restricted and importer's measures are exclusive and mandatory to them, even if their products are domestically certified and even if the arrangement partially allows some other alternatives under the mutual recognition scheme.

On the other hand, what would be a legal characterization of the measure if the US scheme in *US-Tuna II* allowed the labeling requirement established by a relevant international standard organization such as AIDCP? If the international standards were allowed in the US market along with the designated labeling standard in dispute, would this render the US measure non-exclusive and, thus, a 'standard'?

All these conceptual problems are created because the criterion "only and exclusive means" does not deal with some factors inherent to a measure itself. The exclusivity or inclusivity is determined by the existence of other options, not some factors inherent to the measure itself. Moreover, a measure which excludes all other means can also be operated on a voluntary

basis. Likewise, a measure which allows other alternatives can still be legally compulsory, making such an inclusive measure a mandatory ‘technical regulation’. Therefore, it may be more appropriate to determine the mandatory/voluntary compliance character based on the measure’s inherent feature, rather than by the measure’s exogenous factors such as the existence of some alternatives.

6.2.1.4 A criterion to consider “nature of the matter addressed” and a suggestion to consider *specificity* of the matter

The last criterion is consideration on the “nature of the matter addressed by the measure”. The AB mentioned this criteria as one of the four relevant factors to consider regarding the mandatoriness analysis but did not sufficiently explain in specific terms, so the criteria remains legally ambiguous.

One aspect of the nature of the matter can be considered highly relevant to the legal element of mandatoriness. This feature can be labeled as *specificity* of the matter. In *US-Tuna II*, for example, the matter addressed by the measure was a labeling scheme which specifically regulated the fishing method of tuna in specifically designated ocean for the purpose of protecting a species, namely, dolphin. In other words, the regulatory purpose, regulated methods, and regulated product were all so narrowly and specifically designated in the measure.

Due to the high *specificity* in the nature and architecture of the US measure, the resulting binding force turned out to be fairly high. This implies that the more specific the purpose of a measure is, and/or the more specific the way regulated by a measure is, and/or the more specific the product subject to a measure is, the stronger influence the measure will have on producers and suppliers to comply. Therefore, a purpose of protecting dolphins rather than marine mammals in general, a regulatory structure of requiring to equip certain device and to use it in certain marine area rather than general requirements to follow, and/or a specific product like tuna product rather than fish products in general must have necessarily accompanied strong and direct influence on restraining the producers’ choice.

Therefore, the specificity of the measure can be a useful criterion to consider, and a finding of high specificity in a measure at dispute would likely lead to a finding of mandatoriness and

vice versa. Nevertheless, this cannot be an absolute and determinative criterion for mandatoriness. It should be noted that the feature of specificity can be one possible component for the “nature of the matter” criterion.

6.2.2 Reconsidering the concept of “mandatory” based on the *market-entry condition* criterion

The adjudicating body of the WTO dispute settlement system seems to disagree with the idea of adopting a market-entry condition criterion in making a determination of “mandatory compliance”. In *US-Tuna II* dispute, the US argued that the compliance with its labeling scheme was not mandatory because non-labelled products may be marketed. Also, one of the Panel who had a separate opinion from the majority stated that the compliance with the US measure was not *de jure* mandatory because non-labelled products may be marketed. Although the dissenting panel member could not precede its examination since the complaining party Mexico did not successfully establish factual arguments that supported its position. Nevertheless, the dissenting panel seems to have supported an introduction of the interpretative approach based on *de facto* mandatory compliance. The panel, however, mentioned that there are two components to demonstrate before establishing a *de facto* mandatory concept. The two components were impossibility to market without the label and the fact that such impossibility arose from the measure or another government action. In short, the dissenting panel required the *de facto* mandatoriness to be based on market entry denial and a causal link between the denial and some government action.

Although the defending party US tried to argue that the measure was not mandatory since it was not market-entry condition, the AB explicitly disagreed with this US argument. The, AB noted that definition of “technical regulation” does not contain any word like “market” or “territory” nor does it indicate that a labeling requirement is “mandatory” only if there is a requirement to use a particular label in order to place a product for sale on the market. Thus, the AB objected to adopting a market-entry perspective, stating,

“ [t]o us, the mere fact that there is no requirement to use a particular label in order to place a product for sale on the market does not preclude a finding that a measure constitutes a “technical regulation” within the meaning of Annex 1.1. Instead, in the context of the present case, we attach significance to the fact that, while it is possible to sell tuna products without a “dolphin-safe” label in the United States, any “producer, importer, exporter, distributor or seller” of tuna products must comply with the measure at issue in order to make any “dolphin-safe” claim.”⁴⁸⁴

The AB’s expressive rejection to a market-entry condition approach can cause some additional confusion in the operation of the WTO TBT regime. First of all, it is widely understood that the term *mandatory* or *voluntary* in general context indicates that use of a certain standard can either be legally required or not legally required for a product before it is put on market sale. Accordingly, international, regional or domestic standardizing bodies publicly announce that their standards are *mandatory* or *voluntary* and the WTO members notify to the WTO secretariat of their *mandatory* technical regulations based on their self-judgment on the mandatoriness. However, the problem is that, as shown in *US-Tuna II*, the AB explicitly opposed the idea of considering whether a standard is a market-entry prerequisite or not in finding mandatoriness but did not provide any determinative element for judging *mandatory* or *voluntary* concept within the meaning of the TBT Agreement. The AB’s strict textualist approach and insufficient consideration of the context such as wide acceptance of the market-entry condition approach inevitably results in this legal obscurity and practical confusion.

6.3 Revisiting ‘Standard’ in the TBT Regime

In line with the implications and partial conclusions of the analyses in the previous Chapters of this thesis, this Chapter finally revisits the concept of ‘standards’ and attempts to

⁴⁸⁴ AB report, *US-Tuna II*, para. 196.

suggest an appropriate way to understand and apply the concept in practice. In conclusion, there are basically two arguments and suggestions. First, it may be desirable to carry out the legal characterization of a measure in accordance with a suggested two-stage review process. Currently, the one-stage-three-criteria review process is introduced and applied when a measure at issue is reviewed in disputes. However, this process is based on the definition of ‘technical regulations’ only and seems to be an incomplete approach because it consequently neglects the definition of ‘standards’ and the conceptual existence of a larger outer boundary which combines the two. Furthermore, this process is not even consistently applied in actual dispute settlements, which urgently calls for an established order and review process.

Second, it further argues that the recent approach to interpreting “mandatory/voluntary compliance” concept in *US-Tuna II* does not sufficiently provide a generally applicable set of criteria for future disputes. The majority of the criteria are redundant or only providing necessary conditions, rather than sufficient conditions. Moreover, this Chapter noted that some of the interpretative approaches were excessively relied on textual interpretation, thereby rejecting some of the practical approaches suggested by the disputants and the Panel.

Finally, it emphasizes that the concept of “mandatory/voluntary compliance” should be extensively applied so that part of the legally voluntary but virtually mandatory ‘standards’ can be more directly and effectively regulated by the TBT Agreement.

Chapter 7. Conclusion

‘Standard’ has been one of the most important subject matters of the GATT/WTO TBT regime. From the very inception of the proposed TBT Agreement right after the Kennedy Round, ‘standard’ has been considered as one of the major causes for technical barriers, along with ‘technical regulation’. ‘Standard’ and ‘technical regulation’ differ from each other basically in terms of their standardizing bodies, trade effects, and standardization purposes, and, therefore, the regulatory distinction between them in the TBT Agreement seems to be natural and essential. However, despite the importance of the distinction, the TBT Agreement only puts a vague and indefinite dividing line between them. This dividing line contains vague boundaries, overlaps and some loopholes in practice, creating a large loophole in the system.

This thesis addressed this important issue surrounding the regulatory scope of the TBT Agreement, particularly in respect of the meaning, regulatory scope and legal status of ‘standards’ in the TBT regime. The concept of ‘standard’ in the current TBT Agreement is too generally defined, and the extent of its coverage remains tremendously obscure. As a result, there are several fundamental legal issues related to the clarification and delineation of this concept. Some of them, for example, include such questions as whether the concept covers non-product-related process and production methods, whether the concept is primarily determined by its standardizing bodies, or whether the concept includes legally voluntary but virtually mandatory standards.

There are quite a few major academic researches, dealing with the operation of the TBT Agreement, not to mention this specific fundamental legal issue of clarifying the concept of ‘standard’. On this background, this thesis adopts the evolutionary aspect of the concept as one important source of reference for grasping its meaning and scope. Fortunately, there are a handful dispute cases in which this issue has been briefly touched upon, albeit the WTO

adjudicating body fell short of establishing a general principle for the issue. Accordingly, this thesis takes into account all relevant arguments and approaches suggested during the disputes and consider them as valuable sources for establishing the foundation of the concept.

Notably, 'standard' has long been perceived by the TBT Agreement as one important cause for technical barriers and, thus, the past draft and final TBT codes treated it as equivalently as 'technical regulation'. In the process of its conceptual development, the regulatory scope of 'standard' has expanded through negotiations, and the concept has gradually detached from the factor of existence/non-existence of legal basis and the factor of who the standards body are.

In spite of the evolutionary expansion in terms of its concept and scope, the distinction between 'standard' and 'technical regulation' has evolved to be more ambiguous as the legal element of "mandatory/voluntary compliance" became less specific with fewer contextual references. Particularly, the ambiguity originates from the discrepancy between legal perception and actual practice. In other words, "voluntary" 'standards' can be broadly interpreted as covering legally-voluntary- but-virtually-mandatory standards, or can be narrowly interpreted as encompassing only legally-and-virtually voluntary standards. Within the spectrum of these two extreme approaches, the WTO Members and the adjudicating bodies have tried to find out the proper position in actual disputes, setting out a broad foundation for the clarification of the concept 'standards'.

The ambiguous distinction between 'standards' and 'technical regulations', in itself, creates a serious loophole in the operation of the TBT Agreement. Unlike the GATT Standards Code which treated "standards" almost equivalently as "technical regulations" except for a few transparency obligations, the current TBT regime's treatment of 'standards' is apparently dissimilar with the regime's treatment of 'technical regulations' in terms of the strictness of the implementation obligation and the degree of specificity in rules and procedures. In other words, the multilateral trading system's treatment of 'standards' has been revised to be more general and less direct, which potentially causes increasing uncertainty for the interpretation of the definition.

In fact, the vague concept of "voluntary/mandatory" compliance was one of the most critical legal issues in recent *US-Tuna II* dispute. The thorough analysis of the dispute case concludes with the two results. First, the definition of 'standard' is quite limitedly applied in

disputes to date, being interpreted only in the context of “a relevant international standard” as provided in Article 2.4 of the TBT Agreement. There has been no dispute in which ‘standard’ was interpreted solely for the sake of determining a ‘standard’ itself. Also, interpretations of “international standard” were found to be inconsistent. Sometimes, ‘standard’ was reviewed as a legal element of “international standard” based on the definition of the TBT Agreement but, in other times, the phrase “international standard” was examined exclusively based on the definition in the ISO/ECE Guide.

Second, the legal interpretations and the consequent determination of a ‘technical regulation’, which is basically composed of reviews on three legal elements, “identifiable product or group of products”, “lays down product characteristics” and “mandatory compliance”. In particular, the concept of “mandatory compliance” as interpreted in this context is very important since the criterion also affects the concept and regulatory scope of ‘standard’. The concept has rarely been a core legal issue in disputes. However, the disputants in a recent case had substantially different views from each other surrounding the meaning of “mandatory/voluntary compliance” and even the adjudicating bodies like panels and the AB submitted significantly diverging opinions. The analysis shows that the AB considered the “exclusivity” criterion most important for determining the “mandatory/voluntary compliance” concept. The chapter additionally analyzes the major approaches found in disputes, i.e. “market sales condition” approach, “de jure/de facto” approach and “exclusivity” approach, and finds that the adjudicating bodies have overly relied on a strict textualist approach in interpreting the concept “mandatory compliance”.

Finally, the thesis revisits the concept of ‘standards’. Major findings include that the legal characterization of a ‘standard’ or a ‘technical regulation’ should be based on a two-stage review process and that the recently adopted criteria in US-Tuna II dispute fall short of providing generally applicable criteria for reviewing and interpreting the term ‘standards’. In addition, this thesis concludes with a suggestion that a concept like “specificity” can be adopted to partly constitute the legal element of “mandatory/voluntary compliance”. It also concludes with an emphasis that the practically effective domain of the TBT Agreement can be extended if the concept of “mandatory” compliance is flexibly interpreted, rather than narrowly interpreted, introducing some ‘standards’ into the scope of ‘technical regulations’.

Nevertheless, the findings of this thesis will necessitate further studies. Since the analysis

of this thesis is primarily focused on the development of the concept 'standard' itself, it probably needs to extend its scope and discuss the development of rules for 'standard' in order to have a more complete picture of the concept 'standard' defined and treated within the operative context of the TBT Agreement. Furthermore, the legal analysis will essentially require more dispute cases and relevant discussions, admitting the current state that the development of jurisprudence is only at an early stage and it needs more attention and inputs of various academic perspectives in the future.

BIBLIOGRAPHY

- Adlung, Rudolf. "Public Services and the GATS." *Journal of International Economic Law* 9.2 (2006): 455-485.
- Aghatise, E. A. "GATT and Developing Countries: The Tokyo round and after." *African Journal of International & Comparative Law* 1 (1989): 407.
- Appleton, A.E.. "The Agreement on Technical Barriers to Trade." In: Appleton, A., Macroy, P., and Plummer, M. eds. *The World Trade Organization: Legal, Economic and Political Analysis*. Vol.1. Springer Verlag, 2005.
- Bagwell, Kyle, Petros C. Mavroidis, and Robert W. Staiger. "It's a question of market access." *American Journal of International Law* (2002): 56-76.
- Baldwin, Richard E., John McLaren, and Arvind Panagariya. "Regulatory Protectionism, Developing Nations, and a Two-Tier World Trade System [with Comments and Discussion]." *Brookings Trade Forum*. Brookings Institution Press, 2000.
- Bartenhagen, Erik P. "The Intersection of Trade and the Environment: An Examination of the Impact of the TBT Agreement on Ecolabeling Programs" *Virginia Environmental law Journal* 17 (1997): 51.
- Beales III, J. Howard. "Modification and Consumer Information: Modern Biotechnology and the Regulation of Information." *Food & Drug Law Journal* 55 (2000): 105.
- Beghin, John C., and Jean-Christophe Bureau. "Measurement of sanitary, phytosanitary and technical barriers to trade." *Consultants' report prepared for the Food, Agriculture and Fisheries Directorate, OECD* (2001): 17-18.
- Bernstein, Steven, and Erin Hannah. "Non-state global standard setting and the WTO: legitimacy and the need for regulatory space." *Journal of International Economic Law* 11.3 (2008): 575-608.

- Bhagwati, Jagdish. "International trade in services and its relevance for economic development." In: Bhagwati, Jagdish N., and Douglas A. Irwin, eds. *Political economy and international economics*. MIT Press, 1996.
- Bhagwati, Jagdish N., and Robert E. Hudec, eds. *Fair Trade and Harmonization: Prerequisites for free trade?*. Vol. 1. MIT Press, 1996.
- Bhagwati, Jagdish N., and Robert E. Hudec, eds. *Fair Trade and Harmonization: Prerequisites for free trade?*. Vol. 2. MIT Press, 1996.
- Blind, Knut. "The economics of standards." *Theory, evidence, policy*. Cheltenham . 2004.
- Blind, Knut, and Andre Jungmittag. "Trade and the Impact of Innovations and Standards: The Case of Germany and the UK." *Applied Economics* 37.12 (2005): 1385-1398.
- Botzem, Sebastian, and Leonhard Dobusch. "Standardization cycles: A process perspective on the formation and diffusion of transnational standards." *Organization Studies* 33.5-6 (2012): 737-762.
- Browneller, Peggy A.. "Standards Activities of Organizations in the United States." *Journal of Clinical Engineering* 10.1 (1985).
- Calvin, Linda, and Barry Krissoff. "Technical barriers to trade: a case study of phytosanitary barriers and US-Japanese apple trade." *Journal of Agricultural and Resource Economics* (1998): 351-366.
- Cato, James C., and Carlos A. Lima dos Santos. "European Union 1997 seafood-safety ban: the economic impact on Bangladesh shrimp processing." *Marine Resource Economics* 13.3 (1998).
- Chang, Seung Wha. "GATTing a green trade barrier—eco-labelling and the WTO agreement on technical barriers to trade." *Journal of World Trade* 31.1 (1997): 137-159.
- Charnovitz, Steve. "Exploring the environmental exceptions in GATT article XX." *Journal of World Trade* 25.5 (1991): 37-55.
- Chen, Maggie Xiaoyang, and Aaditya Mattoo. "Regionalism in standards: good or bad for trade?." *Canadian Journal of Economics/Revue canadienne d'économique* 41.3 (2008): 838-863.
- Coccodrilli, Fred J. "Dispute Settlement Pursuant to the Agreement on Technical Barriers to Trade: The United States-Japan Metal Bat Dispute." *Fordham International Law Journal* 7 (1983): 137.
- Conrad, Christiane R. *Processes and production methods (PPMs) in WTO law: interfacing trade and social goals*. Vol. 5. Cambridge University Press, 2011.

- Covelli, Nick. "Member Intervention in World Trade Organization Dispute Settlement Proceedings After EC-Sardines: The Rules, Jurisprudence, and Controversy." *Journal of world trade* 37.3 (2003): 673-690.
- Daniels, Peter W. *Service industries in the world economy*. Oxford: Blackwell, 1993.
- David, Paul A., and Shane Greenstein. "The economics of compatibility standards: An introduction to recent research 1." *Economics of innovation and new technology* 1.1-2 (1990): 3-41.
- Daly, Michael, and Hiroaki Kuwahara. "The Impact of the Uruguay Round on Tariff and Non-Tariff Barriers to Trade in the 'Quad'." *The World Economy* 21.2 (1998): 207-234.
- Deardorff, Alan V., and Robert M. Stern. "Measurement of Nontariff Barriers." (1997).
- Deardorff, Alan V., and Robert M. Stern. "The effects of the Tokyo round on the structure of protection." *The Structure and Evolution of Recent US Trade Policy*. University of Chicago Press, 1984. 361-388.
- DiMascio, Nicholas, and Joost Pauwelyn. "Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?." *American Journal of International Law* (2008): 48-89.
- Disdier, Anne-Célia, Lionel Fontagné, and Mondher Mimouni. "The impact of regulations on agricultural trade: evidence from the SPS and TBT agreements." *American Journal of Agricultural Economics* 90.2 (2008): 336-350.
- Du, Michael Ming. "Reducing product standards heterogeneity through international standards in the WTO: how far across the river?." *Journal of World Trade* 44.2 (2010): 295-318.
- Du, Michael Ming. "Domestic Regulatory Autonomy under the TBT Agreement: From Non-discrimination to Harmonization." *Chinese Journal of International Law* 6.2 (2007): 269-306.
- Essaji, Azim. "Technical regulations and specialization in international trade." *Journal of International Economics* 76.2 (2008): 166-176.
- Fauchald, Ole Kristian. "Flexibility and Predictability Under the World Trade Organization's Non-Discrimination Clauses." *Journal of world trade* 37.3 (2003): 443-482.
- Feketekuty, Geza. *International trade in services: An overview and blueprint for negotiations*. Cambridge, Massachusetts: Ballinger Publishing Company, 1988.

- Fitzgerald 1, Peter L. "'Morality' May Not Be Enough to Justify the EU Seal Products Ban: Animal Welfare Meets International Trade Law." *Journal of International Wildlife Law & Policy* 14.2 (2011): 85-136.
- Gandal, Neil. "Quantifying the trade impact of compatibility standards and barriers: an industrial organization perspective." *Paper, World Bank Workshop on Trade and Standards*. 2000.
- Gandhi, Samir R. "Regulating the use of voluntary environmental standards within the World Trade Organization legal regime: Making a case for developing countries." *Journal of World Trade* 39.5 (2005): 855-880.
- Gebrehiwet, Yemane, Simphiwe Ngqangweni, and Johann F. Kirsten. "Quantifying the trade effect of sanitary and phytosanitary regulations of OECD countries on South African food exports." *Agrekon* 46.1 (2007): 1-17.
- Graham, Thomas R. "Practitioner's Guide to the Tokyo Round Trade Negotiations, a." *North Carolina Journal of International Law & Commercial Regulation* 4 (1978): 225.
- Graham, Thomas R. "Reforming the International Trading System: The Tokyo Round Trade Negotiations in the Final Stage." *Cornell International Law Journal* 12 (1979): 1.
- Graham, Thomas R. "Results of the Tokyo Round." *Georgia Journal of International & Comparative Law* 9 (1979): 153.
- Groetzinger Jr, Jon. "New GATT Code and the International Harmonization of Products Standards, The." *Cornell International Law Journal* 8 (1974): 168.
- Hadfield, Gillian K., Robert Howse, and Michael J. Trebilcock. "Information-based principles for rethinking consumer protection policy." *Journal of Consumer Policy* 21.2 (1998): 131-169.
- Halpern, Adrian Rafael. "US-EC Hormone Beef Controversy and the Standards Code: Implications for the Application of Health Regulations to Agricultural Trade, The." *North Carolina Journal of International Law and Commercial Regulation* 14 (1989): 135.
- Henson, Spencer, and John Sullivan Wilson. *The WTO and technical barriers to trade*. Edward Elgar Publishing, 2005.
- Howse, Robert, and Donald Regan. "The product/process distinction-an illusory basis for disciplining'unilateralism'in trade policy." *European Journal of International Law* 11.2 (2000): 249-289.

- Howse, Robert, and Elisabeth Tuerk. "The WTO impact on internal regulations-a case study of the Canada-EC asbestos dispute." *The EU and the WTO: legal and constitutional issues* 283 (2001).
- Howse, Robert. "The Sardines Panel and AB Rulings—Some Preliminary Reactions." *Legal Issues of Economic Integration* 29.3 (2002): 247-254.
- Howse, Robert. "Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate, The." *Columbia Journal of Environmental Law* 27 (2002): 491.
- Howse, Robert. "From Politics to Technocracy-and Back Again: The Fate of the Multilateral Trading Regime." *American Journal of International Law* (2002): 94-117.
- Howse, Robert, and Joanna Langille. "Permitting Pluralism: The Seal Products Dispute and Why the WTO Should Accept Trade Restrictions Justified by Noninstrumental Moral Values." *Yale Journal of International law* 37 (2012): 367.
- Hudec, Robert E. "GATT or GABB? The future design of the General Agreement on Tariffs and Trade." *Yale Law Journal* (1971): 1299-1386.
- Jackson, John Howard. *World Trade and the Law of GATT:(a Legal Analysis of the General Agreement on Tariffs and Trade)*. Bobbs-Merrill, 1969.
- Jackson, John H., Jean-Victor Louis, and Mitsuo Matsushita. "Implementing the Tokyo Round: Legal Aspects of Changing International Economic Rules." *Michigan Law Review* (1982): 267-397.
- Jackson, John H. "National treatment obligations and non-tariff barriers." *Michigan Journal of International Law* 10 (1989): 207.
- Jackson, John H., and William J. Davey. "Legal Problems of International Economic Relations: Cases Materials and Text on the National and International Regulation of Transnational Economic Relations." 5th ed. 2008.
- Joshi, Manoj. "Are eco-labels consistent with WTO agreements?." *Journal of World Trade* 38.1 (2004): 69-92.
- Kunzlik, Peter. "Environmental issues in international procurement." *Public Procurement Global Revolution London-The Hague–Boston: Kluwer Law International* (1998).
- Lester, Simon, and William Stenberg. "The GATT Origins of TBT Agreement Articles 2.1 and 2.2." *Journal of International Economic Law* 17.1 (2014): 215-232.
- Li, Yuan, and John C. Beghin. "A meta-analysis of estimates of the impact of technical barriers to trade." *Journal of Policy Modeling* 34.3 (2012): 497-511.

- Lydgate, Emily Barrett. "Consumer preferences and the National Treatment Principle: emerging environmental regulations prompt a new look at an old problem." *World Trade Review* 10.02 (2011): 165-188.
- Marceau, Gabrielle Zoe, and Joel P. Trachtman. "The technical barriers to trade agreement, the sanitary and phytosanitary measures agreement, and the general agreement on tariffs and trade: a map of the new World Trade Organization law of domestic regulation of goods." *Journal of World Trade* 36.5 (2002): 811-881.
- Marconini, M. "The Uruguay Round Negotiations on Services: An Overview." In: Messerlin and Sauvart eds., *The Uruguay Round: Services in the World Economy*. World Bank and United Nations Center on Transnational Corporation, 1990.
- Marks, Matthew J., and Harold B. Malmgren. "Negotiating nontariff distortions to trade." *Law & Policy International Business* 7 (1975): 327.
- Maskus, Keith E., Tsunehiro Otsuki, and John S. Wilson. "An empirical framework for analyzing technical regulations and trade." *Quantifying the impact of technical barriers to trade: Can it be done* (2001): 29-58.
- Maskus, Keith Eugene. *Regulatory standards in the WTO: Comparing intellectual property rights with competition policy, environmental protection, and core labor standards*. Institute for International Economics, 2000.
- Maskus, Keith E., John S. Wilson, and Tsunehiro Otsuki. *Quantifying the impact of technical barriers to trade: a framework for analysis*. No. 2512. The World Bank, 2000.
- Matsushita, Mitsuo, Thomas J. Schoenbaum, and Petros C. Mavroidis. "The World Trade Organization." *Law, Practice, and Policy* 2 (2003): 141.
- Mayeda, Graham. "Developing disharmony? The SPS and TBT agreements and the impact of harmonization on developing countries." *Journal of International Economic Law* 7.4 (2004): 737-764.
- Melser, Daniel, and Peter E. Robertson. "Eco-labelling and the Trade-Environment Debate." *The World Economy* 28.1 (2005): 49-62.
- McDonald, Jan. "Domestic regulation, international standards, and technical barriers to trade." *World Trade Review* 4.02 (2005): 249-274.
- McRae, D. M., and J. C. Thomas. "GATT and Multilateral Treaty Making: The Tokyo Round, The." *American Journal of International Law* 77 (1983): 51.
- Moenius, Johannes. "Information versus product adaptation: The role of standards in trade." *Available at SSRN 608022* (2004).

- Motaal, Doaa Abdel. "The" Multilateral Scientific Consensus" and the World Trade Organization." *Journal of World Trade* 38.5 (2004): 855-876.
- Nakagawa, Junji. *International harmonization of economic regulation*. Oxford University Press, 2011.
- Pauwelyn, Joost. "Rien ne Va Plus? Distinguishing domestic regulation from market access in GATT and GATS." *World Trade Review* 4.02 (2005): 131-170.
- Pillai, Rajesh. "National Treatment and WTO Dispute Settlement." *World Trade Review* 1.03 (2002): 321-343.
- Otsuki, Tsunehiro, John S. Wilson, and Mirvat Sewadeh. "Saving two in a billion:: quantifying the trade effect of European food safety standards on African exports." *Food Policy* 26.5 (2001): 495-514.
- Revesz, Richard L. "Federalism and regulation: extrapolating from the analysis of environmental regulation in the United States." *Journal of International Economic Law* 3.2 (2000): 219-233.
- Roberts, Donna. "Preliminary assessment of the effects of the WTO agreement on sanitary and phytosanitary trade regulations." *Journal of International Economic Law* 1.3 (1998): 377-405.
- Rothberg, Steven J. "From Beer to BST: Circumventing the GATT Standards Code's Prohibition on Unnecessary Obstacles to Trade." *Minnesota Law Review* 75 (1990): 505.
- Sanders, Beth. "International Trade-Possible Undermining of US Pesticide and Food Safety Laws by the Draft Text of the Uruguay Round of GATT Negotiations." *Georgia Journal of International & Comparative Law* 22 (1992): 233.
- Sheargold, Elizabeth, and Andrew D. Mitchell. "Oils ain't oils: Product labelling, palm oil and the WTO." *Melbourn Journal of International law* 12 (2011): 396.
- Staffin, Elliot B. "Trade Barrier or Trade Boon-A Critical Evaluation of Environmental Labeling and Its Role in the Greening of World Trade." *Columbia Journal of Environmental Law* 21 (1996): 205.
- Stewart, Terence P. "The GATT Uruguay Round." *A Negotiating History (1986-1992)* 3 (1993).
- Swann, Peter, Paul Temple, and Mark Shurmer. "Standards and trade performance: the UK experience." *The Economic Journal* (1996): 1297-1313.

- Sykes, Alan O. "The (limited) role of regulatory harmonization in international goods and services markets." *Journal of International Economic Law* 2.1 (1999): 49-70.
- Sykes, Alan O. "Regulatory competition or regulatory harmonization? A silly question?." *Journal of International Economic Law* 3.2 (2000): 257-264.
- Sykes, Alan O. *Product standards for internationally integrated goods markets*. Brookings Institution Press, 2001.
- Thilmany, Dawn D., and Christopher B. Barrett. "Regulatory barriers in an integrating world food market." *Review of Agricultural Economics* 19.1 (1997): 91-107.
- Trachtman, Joel P. "Toward Open Recognition? Standardization and Regional Integration Under Article XXIV of GATT." *Journal of International Economic Law* 6.2 (2003): 459-492.
- Trachtman, Joel P. "Regulatory Jurisdiction and the WTO." *Journal of International Economic Law* 10.3 (2007): 631-651.
- Trebilcock, Michael J., and Robert Howse. *The regulation of international trade*. Psychology Press, 2005.
- Vogel, David. "Is there a race to the bottom? The impact of globalization on national regulatory policies." *Tocqueville Review* 22.1 (2001): 163-172.
- Wilson, John Sullivan, and Victor O. Abiola, eds. *Standards and global trade: A voice for Africa*. World Bank Publications, 2003.
- Winham, Gilbert R. *International trade and the Tokyo Round negotiation*. Princeton: Princeton University Press, 1986.
- Wijkström, Erik. "Improving Regulatory Governance: International Standards and the WTO TBT Agreement." *Journal of World Trade* 47. 5(2013): 1013-1046.
- Wolfrum, Rüdiger, Peter-Tobias Stoll, and Anja Seibert-Fohr, eds. *WTO: technical barriers and SPS measures*. Vol. 3. Martinus Nijhoff Publishers, 2007.
- Yue, Chengyan, John Beghin, and Helen H. Jensen. "Tariff equivalent of technical barriers to trade with imperfect substitution and trade costs." *American Journal of Agricultural Economics* 88.4 (2006): 947-960.
- Ziegler, Oliver. *EU Regulatory Decision Making and the Role of the United States*. Springer, 2013.

- Zhou, Weihuan. "US–Clove Cigarettes and US–Tuna II (Mexico): Implications for the Role of Regulatory Purpose under Article III: 4 of the GATT." *Journal of International Economic Law* 15.4 (2012): 1075-1122.
- Zhou, Weihuan. "The role of regulatory purpose under Article III:2 and 4 - toward consistency between negotiating history and WTO jurisprudence." *World Trade Review* 11.1 (2012): 81-118.
- Zreczny, Alan Isaac. "Process/Product Distinction and the Tuna/Dolphin Controversy: Greening the GATT Through International Agreement, The." *Buffalo Journal of International Law* 1 (1994): 79.

GATT / WTO Official Documents

- GATT, Programme for Expansion of International Trade: Obstacles to Trade in Industrial Products-Note by the Director-General in Twenty-Fourth Session 9-24 November 1967. L/2893 (7 November 1967).
- _____, Review of the Work of the Contracting Parties through the Last Two Decades and Conclusions on Their Future Work Programme. L/2943 (28 November 1967).
- _____, Committee on Trade in Industrial Products. COM.IND/1 (12 January 1968).
- _____, Report on First Meeting of the Committee. L/3083 (28 October 1968).
- _____, Procedure in Examination of Non-tariff Barriers: Suggestions by Canada. COM.IND/8 (31 January 1969).
- _____, Country Index to Notifications in the Inventory. COM.IND/W/21 (24 December 1969).
- _____, Report to Council. L/3298 (22 December 1969).
- _____, Report of Working Group 3 on Non-tariff Barriers - Examination of Items in Part 3 of the Illustrative List (Standards Acting as Barriers to Trade)". Spec(70)62 (10 June 1970).
- _____, Summary of Proposals in Reports of the Five Working Groups on Non-tariff Barriers. COM.IND/W/36 (27 October 1970).
- _____, Report of Working Group 3 on Non-tariff Barriers - Examination of Items in Part 3 of the Illustrative List (Standards Acting as Barriers to Trade). COM.IND/W/41 (26 November 1970).
- _____, Group 3 on Standards. COM.IND/W/108 (25 June 1973).

- _____, Packaging, Labelling and Marking - Documentary Note by the Secretariat. COM.IND/W/114 (11 October 1973).
- _____, Part 3 of the Inventory of Non-tariff Measures: Standards Involving Imports and Domestic Goods - Note by the Secretariat, MTN/3B/3, 14 February 1974.
- _____, Group 3(e): Sanitary and Phyto-sanitary Regulations - Note by the Secretariat. MTN/3E/W/2 (18 February 1974).
- _____, Group 3(b): Packaging and Labelling-Note by the Secretariat on the work of other organization. MTN/3B/7 (March 12, 1974).
- _____, Group 3(e): Work on Task 15- Draft Code on Standards - Note by the Secretariat. MTN/3E/W/11 (29 March 1974).
- _____, Group 3(b): Packaging and Labelling - Note by the Secretariat on Meeting of May 1974. MTN/3B/12 (17 May 1974).
- _____, Group 3(b): Packaging and Labelling - Note by the Secretariat on the Work of Other Organizations. MTN/3B/17 (11 June 1974).
- _____, Group 3(e): Work on Task 15 - Some Aspects of the Applicability of the Draft Code on Standards to Agriculture - Note by the Secretariat. MTN/3E/W/26 (8 October 1974).
- _____, Non-tariff Measures Affecting Trade of Developing Countries - Note by the Secretariat. MTN/3B/23 (31 December 1974).
- _____, Standards; Packaging and Labelling; Marking of Origin - Background Note by the Secretariat. MTN/NTM/W/5 (21 April 1975).
- _____, Acting Chairman's Summing-up and Record of Decisions Taken at the Meeting. MTN/NTM/3 (16 May 1975).
- _____, Definitions - Working Paper by the Secretariat. MTN/NTM/W/14 (26 June 1975).
- _____, Issues Raised and Suggestions Made at May Meeting of Sub-Group - Note by the Secretariat. MTN/NTM/W/12 (10 July 1975) and MTN/NTM/W/12/Add.1 (15 August 1975).
- _____, The Applicability of the ECE/ISO Definitions for the Proposed Standards Code - Note by the Secretariat. MTN/NTM/W/18 (17 September 1975).
- _____, Proposal by Nordic Delegation. MTN/NTM/W/19 (24 September 1975).
- _____, Meeting at Technical level of September/October 1975 - Note by the Secretariat. MTN/NTM/W/25 (6 November 1975).

- _____, Definitions - Note by the Secretariat. MTN/NTM/W/35 (27 January 1976).
- _____, Meeting of January/February 1976 - Note by the Chairman. MTN/NTM/12 (24 February 1976).
- _____, Applicability of ECE/ISO Definitions-Note by the Secretariat. MTN/NTM/W/38 (5 March 1976).
- _____, Points before the Sub-Group - Note by the Secretariat. MTN/NTM/W/37 (10 March 1976).
- _____, Meeting of May 1976-Summing-up by the Chairman. MTN/NTM/17 (24 May 1976).
- _____, Points before the Sub-Group - Note by the Secretariat. MTN/NTM/W/50 (16 June 1976).
- _____, Draft Code of Conduct for Preventing Technical Barriers to Trade. MTN/NTM/W/49 (18 June 1976).
- _____, Definitions - Note by Mr. K. Bergholm (Finland). MTN/NTM/W/70 (9 November 1976).
- _____, Meeting of November 1976-Summing-up by the Chairman. MTN/NTM/25 (16 November 1976).
- _____, Packaging and Labelling-Statement by Representative of India at the meeting of November 1976. MTN/NTM/W/75 (29 November 1976).
- _____, Draft Code of Conduct for Preventing Technical Barriers to Trade. MTN/NTM/W/71 (19 January 1977).
- _____, Definitions - Note by Mr. K. Bergholm (Finland). MTN/NTM/W/86 (25 February 1977).
- _____, Meeting of March 1977 - Summing-Up by the Chairman. MTN/NTM/31 (29 March 1977).
- _____, Insertions in the Text of the Draft Standards Code - Note by the Secretariat. MTN/NTM/W/93 (29 March 1977).
- _____, Draft Code of Conduct for Preventing Technical Barriers to Trade - Note by the Secretariat. MTN/NTM/W/94 (20 May 1977).
- _____, Points before the sub-group - Note by the Secretariat. MTN/NTM/W/95 (20 May 1977).
- _____, Draft Code of Conduct for Preventing Technical Barriers to Trade - Note by the

Secretariat. MTN/NTM/W/119 (18 November 1977)

- _____, Points before the Sub-Group. MTN/NTM/W/120 (18 November 1977).
- _____, Synoptic Table of Proposals on Sections 19 and 21 of Draft Standards Code. MTN/NTM/W/130 (19 December 1977).
- _____, Draft Code of Conduct for Preventing Technical Barriers to Trade. MTN/NTM/W/150 (29 March 1978).
- _____, Points before the Sub-Group. MTN/NTM/W/151 (30 March 1978).
- _____, Proposals on Special and Differential Treatment. MTN/NTM/W/154 (17 May 1978).
- _____, Summary of Activities of International Organizations to Assist Developing Countries in the Standards Area. MTN/NTM/W/177 (19 July 1978).
- _____, Technical Barriers to Trade. MTN/NTM/W/192 (17 October 1978), MTN/NTM/W/192/Add.1 (17 October 1978) and MTN/NTM/W/192/Add.2 (29 November 1978).
- _____, Meeting of November 1978. MTN/NTM/58 (1 December 1978).
- _____, Technical Barriers to Trade: Revision. MTN/NTM/W/192/Rev.1 (5 December 1978).
- _____, Technical Barriers to Trade: Revision. MTN/NTM/W/192/Rev.2 (19 December 1978).
- _____, Technical Barriers to Trade: Revision. MTN/NTM/W/192/Rev.3 (21 December 1978).
- _____, Technical Barriers to Trade: Revision. MTN/NTM/W/192/Rev.4 (21 March 1979).
- _____, Technical Barriers to Trade: Revision. MTN/NTM/W/192/Rev.5 (29 March 1979).
- _____, Agreement on Technical Barriers to Trade: Rectifications of a Formal Character. MTN/NTM/W/256 (20 June 1979).
- _____, The Agreement's Applicability to Processes and Production Methods - Paper by the Delegation of the United States. TBT/W/24 (3 February 1981).
- _____, Second Three-Year Review of the Operation and Implementation of the Agreement. TBT/23 (13 November 1985).
- _____, Ministerial Declaration on the Uruguay Round. GATT Doc. No. MIN.DEC (20 September, 1986).

- _____, Communication from the United States. MTN/GNG/NG8/W/1 (5 March 1987).
- _____, Communication from the European Economic Community. MTN.GNG/NG8/W/8 (15 September 1987).
- _____, Minutes of the Meeting Held on 22 June 1987. TBT/M/25 (23 September 1987).
- _____, Communication from India. MTN.GNG/NG8/W/9 (30 September 1987).
- _____, Subjects Related to the Uruguay Round in the Area of Technical Barriers to Trade. MTN.GNG/NG8/W/13 (2 October 1987).
- _____, Definitions for Terms used in the Agreement on Technical Barriers to Trade - Note by the Secretariat. TBT/W/106 (21 January 1988).
- _____, Communication from the United States. MTN.GNG/NG8/W/24 (18 February 1988).
- _____, Agreement on Technical Barriers to Trade: Aspects of the Agreement Proposed for Negotiation – Note by the Secretariat. MTN.GNG/NG8/W/25 (26 February 1988).
- _____, Agreement on Technical Barriers to Trade: Aspects of the Agreement Proposed for Negotiation. MTN.GNG/NG8/W/34/Rev.1 (26 February 1988).
- _____, Extension of Major Obligations under the Agreement on Technical Barriers to Trade to Local Government Bodies - Proposal by the European Economic Community. TBT/W/113 (7 July 1988).
- _____, A Code of Good Practice for Non-governmental Bodies in the Agreement on Technical Barriers to Trade - Proposal by the European Economic Community. TBT/W/110 (7 July 1988).
- _____, Improved Transparency in Bilateral Standards-Related Agreements in the GATT Agreement on Technical Barriers to Trade - Proposal by the United States. MTN.GNG/NG8/W/34 (26 August 1988).
- _____, Improved Transparency in Regional Standards Activities in the GATT Agreement on Technical Barriers to Trade - Proposal by the United States. MTN.GNG/NG8/W/35 (26 August 1988).
- _____, Testing Procedures - Draft Proposal by the Nordic Delegations. TBT/W/118 (10 January 1989).
- _____, Inspection Procedures - Draft Proposal by the Nordic Countries. TBT/W/119 (10 January 1989).
- _____, Improving Transparency - Draft Proposal by the Nordic Delegations. TBT/W/120

(10 January 1989).

- _____, Processes and Production Methods - Draft Proposal by the United States (Addendum). TBT/W/108/Add.1 (31 January 1989).
- _____, Applicability of the Agreement on Technical Barriers to Trade to Sanitary and Phytosanitary Regulations and Barriers - Note Submitted by the Nordic Delegations. MTN.GNG/NG5/WGSP/W/5 (22 May 1989).
- _____, Improved Transparency in Bilateral Standards-Related Agreements in the Agreement on Technical Barriers - Revised Text of Proposal by the United States. MTN.GNG/NG8/W/34/Rev.1 (13 July 1989).
- _____, Environmental Technical Regulations and Standards Notified Under the Agreement on Technical Barriers to Trade: 1980-91 - Note by the Secretariat. TBT/W/156 (13 July 1989).
- _____, Code of Good Practice for Non-governmental Standardizing Bodies - Proposal by the European Economic Community. TBT/W/124 (27 July 1989).
- _____, Testing and Inspection Procedures - Note by the Nordic Delegations. TBT/W/126 (9 August 1989).
- _____, Improved Transparency in Bilateral Standards-Related Agreements in the GATT Agreement on Technical Barriers - Revised Text of Proposal by the United States. MTN.GNG/NG8/W/34/Rev.2 (15 November 1989).
- _____, Agreement on Technical Barriers to Trade Process and Production Methods - Proposal by New Zealand. MTN.GNG/NG8/W/58 (22 November 1989).
- _____, Dispute Settlement Procedures - Note by the Nordic Delegations. TBT/W/134 (25 January 1990).
- _____, Certification Systems in the Agreement on the Technical Barriers to Trade - Submission by Canada. MTN.GNG/NG8/W/69 (31 January 1990).
- _____, Code of Good Practice for the Preparation, Adoption and Application of Standards - Revised Proposal by the European Economic Community. TBT/W/137 (15 February 1990).
- _____, Code of Good Practice for the Preparation, Adoption and Application of Standards in the Agreement on Technical Barriers to Trade - Revised Proposal by the European Economic Community. MTN.GNG/NG8/W/71 (20 February 1990).
- _____, Improved Transparency in Agreements Concluded within the Code of the Agreement on Technical Barriers to Trade (Revision) - Proposal by the United States.

- TBT/W/128/Rev.1 (21 February 1990).
- _____, Product Approval Procedures - Proposal by the United States (Revision). TBT/W/127/Rev. 1 (21 February 1990).
- _____, Conformity Assessment Procedures - Proposal by the European Economic Community. TBT/W/138 (22 February 1990).
- _____, Improved Transparency in Agreements Concluded within the Scope of the Agreement on Technical Barriers: Revision - Proposal by the United States. MTN.GNG/NG8/W/34/Rev.3 (26 February 1990).
- _____, Redrafting of Article 10 – Proposal by the Nordic Countries. TBT/W/141 (19 March 1990).
- _____, Redrafting of Article 10 of the Agreement on Technical Barriers to Trade - Proposal by the Nordic Countries. MTN.GNG/NG8/W/75 (28 March 1990).
- _____, Technical Regulations and Standards as Unnecessary Obstacles to Trade in the Agreement on Technical Barriers to Trade - Submission by Canada. MTN.GNG/NG8/W/77 (8 May 1990).
- _____, Technical Regulations and Standards as Unnecessary Obstacles to Trade - Submission by Canada. TBT/W/144 (8 May 1990).
- _____, Dispute Settlement Procedures - Note by the Nordic Delegations (Revision). TBT/W/134/Rev.1 (22 May 1990).
- _____, Definitions in the Agreement on Technical Barriers to Trade - Note by the Nordic delegations. TBT/W/145 (25 June 1990).
- _____, Feasibility of Implementing the Code of Good Practice for the Preparation, Adoption and Application of Standards in the Agreement on Technical Barriers to Trade (Proposal in Documents MTN.GNG/NG8/W/71) - Communication from the ISO Central Secretariat. MTN.GNG/NG8/W/78 (25 June 1990).
- _____, Definitions in the Agreement on Technical Barriers to Trade - Note by the Nordic delegations. MTN.GNG/NG8/W/79 (25 June 1990).
- _____, Feasibility of Implementing the Code of Good Practice For The Preparation, Adoption and Application of Standards in the Agreement on Technical Barriers to Trade (Proposal in Documents TBT/W/137) - Communication from the ISO Central Secretariat. TBT/W/146 (25 June 1990).
- _____, The preparation, Adoption and Application of Technical Regulations by Local Government Bodies - Proposal by the European Economic Community. TBT/W/147

(29 June 1990).

- _____, Agreement on Technical Barriers to Trade. MTN.GNG/NG8/W/83/Add.3 (23 July 1990) and MTN.GNG/NG8/W/83/Add.3/Corr.1 (24 July 1990).
- _____, Agreement on Technical Barriers to Trade. MTN.GNG/NG8/W/83/Add.3/Rev.1 (23 October 1990).
- _____, Agreement on Technical Barriers to Trade. MTN.GNG/NG8/W/84 (12 October 1990).
- _____, Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations (Revision). MTN.TNC/W35/Rev.1 (3 December 1990).
- _____, Minutes of the Meeting Held on 31 May 1991 (Chairman: Mr. A. Macey) - New Zealand. TBT/M/4 (5 July 1991).
- _____, Technical Barriers to Trade - Note by the Chairman of Consultations, MTN.GNG/RM/W/7 (31 October 1991).
- _____, Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations. MTN.TNC/W/FA (20 December 1991).
- _____, Environmental Technical Regulations and Standards Notified under the Agreement on Technical Barriers to Trade: 1980-91 - Note by the Secretariat. TBT/W/156 (2 March 1992).
- _____, Labelling Requirements - Note by the Secretariat. TBT/Spec/23 (13 May 1992).
- _____, GATT Secretariat Participation in an Ad Hoc ISO/IEC Meeting on the ISO/IEC Code of Good Practice for Standardization (Geneva, 22 May 1992) - Note by the Secretariat. TBT/W/158 (3 July 1992).
- _____, Applicability of the Agreement to Labelling Requirements - Proposal by the Chairman. TBT/W/159 (17 July 1992).
- _____, Report (1992) of the Committee on Technical Barriers to Trade. L/7107 (3 November 1992).
- _____, Thirteenth Annual Review of the Implementation and Operation of the Agreement. TBT/34 (2 October 1992).
- _____, Ad Hoc ISO/IEC Meeting on the ISO/IEC Code of Good Practice for Standardization (Geneva, 20 November 1992) - Note by the Secretariat. TBT/W/168 (14 January 1993).

- _____, Communication from the ISO/IEC. TBT/W/178 (15 December 1993).
- _____, Communication from the ISO/IEC. TBT/W/179 (10 February 1994).
- _____, Factual Comparison between the Annex 3 of the WTO/TBT Agreement - Code of Good Practice for the Preparation, Adoption and Application of Standards and the ISO/IEC Guide 59 - Code of Good Practice for Standardization - Note by the Secretariat. TBT/W/187 (21 June 1994).
- Preparatory Committee for the World Trade Organization, Environmental Technical Regulations and Standards Notified under the Agreement on Technical Barriers to Trade - Note by the Secretariat. PC/SCTE/W/1 (28 July 1994).
- WTO, World Trade Report 2005: Exploring the links between trade, standards and the WTO, 2005.

Web Sources and Others

- APEC, Elements of the Standards and Conformance Infrastructure: Role of the APEC Specialist Regional Bodies. 2009.
- American National Standards Institute (ANSI), www.ansi.org/about_ansi/overview/overview.aspx?menuid=1. (Assessed September 1, 2013)
- European Standards (EN), www.cen.eu/cen/products/en/pages/default.aspx. (Assessed September 10, 2013)
- International Electrotechnical Commission (IEC), www.iec.ch/standardsdev/publications/is.htm. (Assessed October 2, 2013)
- International Standardization Organization (ISO), www.iso.org/iso/home/standards.htm. (Assessed October 12, 2013)
- ISO. ISO/IEC Guide 2:2004 Standardization and related Activities - General Vocabulary, 2004.
- Korea Agency for Technology and Standards (KATS), http://www.kats.go.kr/en_kats/standard/KAEU03_1.asp. (Assessed May 2, 2014)
- Oxford English Dictionary, oxforddictionaries.com. (Assessed August 27, 2013)
- Toth, Robert B., Standards Activities of Organizations in the United States. NIST Special Publication 806. 1996.
- Wikipedia, www.wikipedia.org. (Assessed August 27, 2013)

ABSTRACT IN KOREAN

국문 초록

WTO 무역기술장벽 협정의 ‘표준’에 관한 법적 연구

오늘날 생산과 소비에 대한 표준의 역할이 중요해지고 표준으로 인해 발생하는 비관세 무역장벽 문제가 심화되고 있는 가운데, GATT/WTO 다자무역체제는 이와 같은 국제 통상과 관련된 표준 문제를 규율하기 위하여 무역기술장벽(TBT)협정을 도입하고 이를 바탕으로 한 제도를 운영하고 있으나, 협정 목적상 ‘표준’에 관한 정의와 적용 범위가 분명하게 확립되지 못하여, 제도 운영의 불확실성과 제도적 한계를 겪고 있다. 이에 따라 본 논문은 WTO TBT협정의 규율대상 중 하나인 ‘표준’의 법적 개념을 연구하였다. 본 논문의 기본 목적은, WTO TBT협정 목적상 ‘표준’이라는 개념의 법적 의미를 재조명하고, 궁극적으로 동 협정이 무역장벽으로서의 표준 문제를 보다 효과적으로 규율할 수 있도록 ‘표준’의 법적 지위와 적용 범위를 확립하기 위한 학술적 근거를 제시하는 것이다.

이를 위하여 본 논문은 우선, 표준의 일반적 의미와 WTO협정 전반에서 나타난 표준에 관한 개념을 연구하였다. 그 결과, 표준에 관한 정의가 일반적으로 통일되어 있지 않았으며 WTO협정들 사이에서도 “표준”이라는 개념이 일관되게 사용되지 않고 있음을 알 수 있었다. 또한, ‘표준’ 개념을 정의하고 ‘표준’에 의한 통상 문제를 규율하는 것이 목적인 TBT협정에서조차도 동 개념이 충분히 구체적으로 규정되지 않아, ‘표준’ 개념의 법적 모호성과 TBT협정 이행상의 혼란이 초래되고 있음을 주목하였다.

따라서 본 논문은 현행 TBT제도에서 의미하는 ‘표준’ 개념을 보다 구체적으로 연구할 필요성을 주목하였다. 특히 ‘기술규정’과 대칭 하면서도 구별되는 ‘표준’의 법적 의미, 적용 범위 및 제도적 지위를 비교 분석함으로써 TBT협정에서의 ‘표준’ 개념을 명료화하고자 하였다. 기본적으로 TBT제도상 TBT협정의 규율대상이 기술규정, 표준 및 적합성평가절차로 나뉘고, ‘표준’은 ‘기술규정’과 개념적으로 매우 유사하지만 “강제적/자발적 이행”이라는 법적 요소에 의해 결정적으로 구분되고 있다. 이러한 구분이 갖는 법적 결과는 매우 중요함을 알 수 있는데, ‘표준’과 ‘기술규정’에 적용되는 규정들을 각각 비교 분석해 보면, TBT협정은 ‘기술규정’보다 ‘표준’에 대해 완화된 법적 의무와 절차를 규정하고 있으며, 중앙정부기관을 통하여 간접적으로, 그리고 부속서의 모범관행규약에 대한 사전 수락을 요건으로 한 조건부로 부과되고 있음을 알 수 있었다. 이처럼 ‘표준’과 ‘기술규정’의 구분에서 비롯되는 중대한 법적 결과에도 불구하고, “강제적/자발적 이행”이라는 법적 요소에 대한 구체적인 규정과 설명이 없어, ‘표준’ 개념의 모호성은 한층 더 심화되고 있다.

TBT협정상 ‘표준’ 개념과 “강제적/자발적 이행” 개념을 명료화하고 바람직한 해석 방향을 제시하기 위하여, 본 논문은 기본적으로 다음의 두 가지 연구를 바탕으로 하는 분석 방법을 채택하고 있다. 그 하나는, TBT협정에 관한 다자협상 과정에서 제시되고 논의되었던 ‘표준’이라는 용어와 그 개념의 발달 과정에 대한 연구하는 것이다. 구체적으로, 해당 연구는 케네디라운드 협상 직후 TBT협정 도입에 관한 초기 논의 당시의 ‘표준’ 개념에서부터 시작하여, 동경라운드 협상 초안들의 ‘표준’ 개념, GATT 표준협정에서 채택된 ‘표준’ 개념, 그리고 우루과이라운드 협상을 거치면서 일부 변화한 ‘표준’ 개념들을 발달사적 측면에서 순차적으로 연구함으로써, 현행 TBT협정상 ‘표준’ 개념의 근본적인 도입 배경을 고찰하고 개념 발달의 흐름 속에서 주목해야 할 중요한 법적 요소와 해석 방향을 제시하고 있다.

다른 하나의 접근방법은, 최근 TBT분쟁에서 나타난 ‘표준’ 및 “강제적/자발적 이행”에 관한 WTO 분쟁해결기구의 해석 입장과 검토 기준들에 관해 연구하는

것이다. 특히 ‘표준’ 과 ‘기술규정’ 을 구분하는 “강제적/자발적 이행” 이라는 법적 요소에 대해 최근 분쟁에서 논의되고 채택되었던 해석 논리와 접근 방법들을 분석함으로써, ‘표준’ 의 의미와 범위를 ‘기술규정’ 과의 관계 속에서 규명하고자 하였다. 이 과정에서 분쟁해결을 위하여 최종적으로 채택된 법적 논리뿐만 아니라 분쟁당사국들과 WTO회원국들이 제시한 다양한 접근 방법들을 분류하고 검토함으로써, 향후 나아갈 방향을 제도의 실용성 측면에서 고려하고 있다.

상기 연구 결과 다음과 같은 몇 가지 중요한 결론들을 도출할 수 있었다. 우선, GATT/WTO 다자협상을 통하여 발전해 온 ‘표준’ 개념의 변천 과정을 연구한 결과, 기본적으로 ‘표준’ 이라는 의미를 나타내기 위하여 사용되었던 용어, 그 정의, 적용 범위가 상당한 변화를 거쳐서 오늘에 이르렀음을 알 수 있었다. 구체적으로 기술하면, 주요한 발달 특징으로 첫째, 이행이 법적으로 자발적이어야 한다는 ‘표준’ 에 관한 명시적인 법적 요건이 협상 과정을 통하여 점차 모호해졌으며 둘째, 과거에는 ‘표준’ 개념에 대해 표준을 준비, 도입, 적용하는 기관에 관한 요건을 중요하게 규정하였으나 표준기관의 범위가 점차 중앙정부 기관, 지방정부 기관 및 비정부 기관을 모두 포함하는 매우 포괄적으로 발전함에 따라 제도적으로 무의미한 요소가 되었다. 셋째, 과거 GATT시절 TBT협정은 ‘표준’ 과 ‘기술규정’ 을 ‘기술요건’ 등과 같은 상위개념에 속하는 대등한 개념으로 간주하였고, 협정 의무에 있어서도 큰 차별을 두지 않았으나, 우루과이라운드 협상을 통하여 ‘표준’ 의 정의가 개정되고 모범관행규약이 도입된 결과, 현행 제도는 ‘표준’ 과 ‘기술규정’ 을 각각의 독립적인 의미와 범위를 갖는 개념으로 규정하고 있다.

또한, 최근 TBT 분쟁에서 나타난 ‘표준’ 개념의 해석과 적용을 연구한 결과 첫째, 현재까지의 분쟁에서는 ‘표준’ 에 관한 법적 해석과 적용이 협정 제2.4조의 “관련 국제표준에 기초하여” 에 관한 검토 맥락에서만 제한적으로 이루어졌으면 그 검토 기준 또한 일관적이지 않았다는 결론을 도출할 수 있었다. 둘째, US-Tuna II 사건을 분석한 결과 ‘기술규정’ 인지 ‘표준’ 인지를 판단하기 위한 법적 검토가 ‘기술규정’ 의 정의를 바탕으로만 이루어지고 ‘표준’ 의 정의는 고려되지 않았는 바, 이러한 검토방법이 바람직한 것인지에 대한 의문을 제기하

였다. 셋째, “강제적/자발적 이행”을 검토하는 과정에서 여러 가지 접근방법들이 제시되고 논의되었으나 상소기구는 “유일하고 배타적인 방법을 제공하였는지”의 기준을 가장 중요하게 고려하는 한편, “사실상(de facto)/법률상(de jure) 강제적이었는지”의 기준과 “시장 판매를 위한 사전적 요건인지”의 기준을 지나친 명문해석을 바탕으로 명시적으로 배제하였다는 연구 결과를 얻을 수 있었다.

이와 같은 연구 결과와 시사점들을 바탕으로 본 논문은, 현행 TBT제도상 ‘표준’의 의미를 재조명하고 향후 바람직한 해석 방향을 위하여 고려되어야 할 사항들을 제시하였다. 그 주요 내용으로 첫째, ‘표준’과 ‘기술규정’이 정의상 다소의 차이가 있음에도 불구하고 궁극적으로는 하나의 상위개념에 속하는 개념으로 이해되어야 할 것이고, 그렇다면 현재 적용되고 있는 1단계의 검토방법보다는, 우선 ‘표준’과 ‘기술규정’을 공통으로 결정하는 법적 요소들을 검토하고, 다음으로 둘을 구분하는 “강제적/자발적 이행”이라는 법적 요소들을 검토하는 2단계 검토방법이 보다 바람직한 접근 방법임을 제시하고 있다. 둘째, 최근 분쟁에서 적용되었던 “강제적/자발적 이행”에 관한 법적 검토기준들이 ‘표준’ 또는 ‘기술규정’을 결정하는 보편적인 검토기준으로 활용될 수 있는지를 검토한 결과, 대부분이 중복적이거나 필수조건들이라는 한계를 지니는 것으로 분석되었다. 셋째, “강제적/자발적 이행” 개념이 통상적으로 “시장판매를 위한 사전적 요건인지”의 기준을 바탕으로 널리 이해되고 있는 반면, 최근 분쟁에서는 상소기구가 이러한 해석 방법을 명시적으로 배제함으로써 ‘표준’ 개념에 관한 실질적인 혼란을 가중시키는 결과를 초래한 것으로 분석된다. 또한 상소기구가 “강제적/자발적 이행” 개념의 모호성을 해결하지 않은 채 사안별 접근방법을 최종적으로 채택함으로써, 결과적으로 TBT제도의 ‘표준’ 개념은 여전히 불확실하게 남아 있으며, 실제 적용에 있어 오히려 혼동이 가중될 수 있음을 주목하였다.

이처럼, 본 연구는 TBT협정의 ‘표준’ 개념에 대한 법 원칙이 아직 충분히 확립되지 않은 초기단계에서 수행되었다는 방법론적인 제약에도 불구하고, 제도 발달과 함께 진화해 온 ‘표준’ 개념의 변천 과정과 분쟁과정에서 나타난 ‘표준’에

대한 다양한 접근 방법들을 포괄적이고 거시적인 차원에서 연구하여 향후 해석 방향을 제시하였다는 점에서 학문적 의의를 지닌다. 이와 같이 TBT제도 발달의 큰 흐름을 파악하고 그 배경 속에서 ‘표준’ 개념을 재조명함으로써, 동 개념에 대한 보다 유연한 해석이 가능하고 궁극적으로는 TBT협정 운용을 활성화시킬 수 있는 실질적인 방안이 도출될 수 있을 것으로 기대한다.

주제어: 표준(standard), 강제적/자발적 이행(mandatory/voluntary compliance), 기술규정(technical regulation), 무역기술장벽 협정(TBT Agreement), 동경라운드 협상(Tokyo Round negotiations)